

16 SEP 1939

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 563

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION,
PENNSYLVANIA-NEW JERSEY, PETITIONER,

v.s.

JOHN D. COLBURN AND BESSIE COLBURN

ON WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY

PETITION FOR CERTIORARI FILED NOVEMBER 30, 1939.

CERTIORARI GRANTED JANUARY 15, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939.

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vs.

JOHN D. COLBURN AND BESSIE COLBURN

ON WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY

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[fol. 1] **IN SUPREME COURT OF NEW JERSEY**

On Mandamus

JOHN D. COLBURN AND BESSIE COLBURN, Relators,

vs.

**DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION,
PENNSYLVANIA-NEW JERSEY, Respondent**

NOTICE OF APPEAL—Filed December 17, 1938

To Robert B. Meyner, Esq., Attorney for Relators:

Please take notice that the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, the respondent in the above entitled cause, appeals from the whole of the judgment entered in this cause, on the 17th day of December, 1938, to the Court of Errors and Appeals.

Dated, December 17th, 1938.

John H. Pursel, Attorney for Respondent.

Service of a copy of the within notice of appeal is acknowledged on this 17th day of December, 1938.

Robert B. Meyner, Attorney for Relators.

[fol. 2] **IN SUPREME COURT OF NEW JERSEY**

GROUND OF APPEAL—Filed January 16, 1939

The Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, the respondent-appellant, states the following grounds of appeal for reversal of the judgment of the New Jersey Supreme Court which is under review in the above entitled cause:

1. The Supreme Court erred in entering judgment that a peremptory writ of mandamus issue, because upon the pleadings and proofs, the relators failed to show that they were the owners of any property which had been taken, injured or destroyed within the purview of the statutes applicable to the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, viz. P. L. 1934, Chapter 215, P. L.

1912, Chapter 297, P. L. 1919, Chapter 76, Revised Statutes
32:8-1 to 32:8-15; 32:9-1 to 32:9-16.

2. The Supreme Court erred in entering judgment that a peremptory writ of mandamus issue, because the record herein fails to disclose the invasion of any legal right of the relators by the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey.

3. The Supreme Court erred in entering judgment that a peremptory writ of mandamus issue, because the statutes applicable to the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, did not create or confer [fol. 3] upon the relators any legal right which was thereafter invaded by the construction of the bridge and its approach by the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey.

4. The Supreme Court erred in entering judgment that a peremptory writ of mandamus issue, because none of the titles of the statutes applicable to the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, expressed any object to create or confer new rights in favor of property owners for damages to property.

5. The Supreme Court erred in entering judgment that a peremptory writ of mandamus issue, because the record herein fails to disclose that relafors suffered or sustained any damage in law by the construction of the bridge and its approach by the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey.

6. The Supreme Court erred in entering judgment that a peremptory writ of mandamus issue, because the record herein fails to disclose that the relators suffered or sustained any damage in fact by the construction of the bridge and its approach by the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey.

7. The Supreme Court erred in entering judgment that a peremptory writ of mandamus issue, because upon the undisputed material facts the relators did not show that the property described in the alternative writ of mandamus had been taken, injured or destroyed by the construction of the bridge and its approach by the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey.

[fol. 4] 8. The Supreme Court erred in entering judgment that a peremptory writ of mandamus issue, because the record disclosed that on May 19th, 1938, the time of the issuance of the alternative writ of mandamus herein, relators were not the owners of the property mentioned and described therein, and that the title to said property was conveyed to relators by Willis Van Gorden and wife on October 12th, 1938, by deed of that date, which deed (Relators' "Ex. P-11") was offered and received in evidence at the trial.

9. The Trial Court erred in admitting in evidence a certain agreement (Relators' "Exhibit P-3"), over objection by respondent, because the record title to the property mentioned and described in the alternative writ of mandamus herein was not in the relators at the time of the issuance thereof and the agreement, therefore, was immaterial and irrelevant because it was only an agreement by the Van Gordens to convey the title of said property to the Colburns, provided they made certain payments of money by a certain date.

10. The Trial Court erred in permitting the relator Bessie Colburn to answer, over objection by respondent, the following question, "What change have you found during the night?", she answering, "The light. You can't put your shades up to get air. No. I cannot get the air.", and the Court in ruling "I will allow her to testify as she has", and also in ruling "If light causes them to keep the shades drawn, therefore, they do not get air.", because the subject was irrelevant and immaterial and not within the issues raised by the pleadings.

[fol. 5] 11. The Trial Court erred in permitting Irvin H. Rex, a witness for relators, to answer, over objection by respondent, questions as to the selling price of the Bachman property; (a) because it was shown that it was not comparable to the property mentioned and described in the alternative writ of mandamus herein; (b) because it was not shown that said Bachman property was sold at a fair and bona fide sale by private contract; (c) because it was not shown that the witness Rex was qualified to testify as to the sale of said Bachman property; and (d) because the witness Rex was not offered as an expert but merely to testify as to the sale of said Bachman property for the sole purpose of qualifying expert witnesses.

12. The Trial Court erred in permitting Irvin H. Rex, a witness for relators, to answer, over objection by respondent, questions as to the selling price of the Parks property; (a) because it was shown that it was not comparable to the property mentioned and described in the alternative writ of mandamus herein; (b) because it was not shown that said Parks property was sold at a fair and bona fide sale by private contract; (c) because it was not shown that the witness Rex was qualified to testify as to the sale of said Parks property; and (d) because the witness Rex was not offered as an expert but merely to testify as to the sale of said Parks property for the sole purpose of qualifying expert witnesses.

13. The Trial Court erred in permitting the said Irvin H. Rex to answer, over objection by respondent, the following question in respect to said Bachman property "How much was it sold for?", and in ruling "I will permit him to testify [fol. 6] to the purchase price of this other piece" (Bachman property), the witness answering "\$1,700.", (a) because the witness' testimony was based purely upon hearsay; (b) because it was shown that it was not comparable to the property mentioned and described in the alternative writ of mandamus herein; (c) because it was not shown that said Bachman property was sold at a fair and bona fide sale by private contract; (d) because it was not shown that the witness Rex was qualified to testify as to the sale of said Bachman property; and (e) because the witness Rex was not offered as an expert but merely to testify as to the sale of said Bachman property for the sole purpose of qualifying expert witnesses.

14. The Trial Court erred in permitting the said Irvin H. Rex to answer, over objection by respondent, the following question in respect to said Parks property, "How much did that sell for?", and in ruling "I will permit him to testify.", the witness answering "\$2,900."; (a) because the witness' testimony was based purely upon hearsay; (b) because it was shown that it was not comparable to the property mentioned and described in the alternative writ of mandamus herein; (c) because it was not shown that said Parks property was sold at a fair and bona fide sale by private contract; (d) because it was not shown that the witness Rex was qualified to testify as to the sale of the Parks property; and (e) because the witness Rex was not offered as an expert

but merely to testify as to the sale of the Parks property for the sole purpose of qualifying expert witnesses.

15. The Trial Court erred in refusing to strike out, on [fol. 7] motion of respondent, the testimony of Carl Colburn, a witness for the relators, in respect to "gas fumes and noise of trucks" the question being "What are the conditions generally now? Describe the neighborhood you are in now.", the answer being "Well, in that section the neighborhood is more or less by itself. It seems that since it has been built there we get a whole lot more noise due to trucks going down the bridge, backfiring, and Routes 22 and 28 are on North Main Street, which was not there before, and in damp weather the gas from the trucks coming through coming from the bridge, seems to lay in this valley and there is no air to take it out of there, and we have the fumes all the time, especially in damp weather.", respondent's counsel's motion being "I move to strike out the witness' testimony with respect to the gas fumes and the noise of the trucks. We do not think that they are in issue here. It is on the light, the air and the view.", the Court's ruling being "I will allow it to stand, Senator Stout.", counsel for respondent further saying "Under the statute it is only with respect to damages, if any, caused by the curtailment of light, air and view.", the Court's further ruling being "Property taken, injured or destroyed. I will allow it to stand for what it is worth.", because the subject was irrelevant and immaterial and not within the issues raised by the pleadings.

16. The Trial Court erred in permitting Edward J. Pierson, a witness for relators, to testify over objection by respondent, in answer to the following question "How much did the bridge commission pay for that property?" (Kolchak property), his answer being "For the Kolchak property, the commission paid \$2,510."; (a) because it was [fol. 8] shown that it was not comparable to the property mentioned and described in the alternative writ of mandamus herein; (b) because it was not shown that said Kolchak property was sold at a fair and bona fide sale by private contract; and (c) because the witness Pierson was not offered as an expert but merely to testify as to the purchase of the Kolchak property for the sole purpose of qualifying expert witnesses.

17. The Trial Court erred in permitting Edward J. Pierson, a witness for relators to testify, over objection by re-

spondent, in answer to the following question "You may give us the purchase price on the Stanna property.", his answer being "It was \$5,250."; (a) because it was shown that it was not comparable to the property mentioned and described in the alternative writ of mandamus herein; (b) because it was not shown that said Stanna property was sold at a fair and bona fide sale by private contract; and (c) because the witness Pierson was not offered as an expert but merely to testify as to the purchase of the Stanna property for the sole purpose of qualifying expert witnesses.

18. The Trial Court erred in permitting Edward J. Pierson, a witness for relators, to testify, over objection by respondent, in answer to the following question "How much did the bridge commission pay for that property?", (Matviak property) his answer being "The commission paid \$2,743."; (a) because it was shown that it was not comparable to the property mentioned and described in the alternative writ of mandamus herein; (b) because it was not shown that said Matviak property was sold at a fair and bona fide sale by private contract; and (c) because the witness Pierson was not offered as an expert but merely to [fol. 9] testify as to the purchase of the Matviak property for the sole purpose of qualifying expert witnesses.

19. The Trial Court erred in permitting Edward J. Pierson, a witness for relators, to testify, over objection by respondent, in answer to the following question "What did the bridge commission pay for that property?" (Gleza property), his answer being "\$4,000"; (a) because it was shown that it was not comparable to the property mentioned and described in the alternative writ of mandamus herein; (b) because it was not shown that said Gleza property was sold at a fair and bona fide sale by private contract; and (c) because the witness Pierson was not offered as an expert but merely to testify as to the purchase of the Gleza property for the sole purpose of qualifying expert witnesses.

20. The Trial Court erred in permitting Edward J. Pierson, a witness for relators, to testify, over objection by respondent, in answer to the following question "How much did the bridge commission pay for that property?", (Tackes property) his answer being "\$3,850"; (a) because it was shown it was not comparable to the property mentioned and described in the alternative writ of mandamus herein;

(b) because it was not shown that said Tackacs property was sold at a fair and bona fide sale by private contract; and (c) because the witness Pierson was not offered as an expert but merely to testify as to the purchase of the Tackacs property for the sole purpose of qualifying expert witnesses.

21. The Trial Court erred in permitting Edward J. Pierson, a witness for relators, to testify, over objection by respondent, [fol. 10] in answer to the following question "How much did the bridge commission pay for that property?" (Zuckowitz property), his answer being "The commission paid \$3,600 for the Zuckowitz property"; (a) because it was shown that it was not comparable to the property mentioned and described in the alternative writ of mandamus herein; (b) because it was not shown that said Zuckowitz property was sold at a fair and bona fide sale by private contract; and (c) because the witness Pierson was not offered as an expert but merely to testify as to the purchase of the Zuckowitz property for the sole purpose of qualifying expert witnesses.

22. The Trial Court erred in accepting, over objection by respondent, William Smith, a witness for relators, as an expert to testify as to the value of the property mentioned and described in the alternative writ of mandamus, the Court's ruling being, "I am going to accept him as an expert", the objection being that it had been shown that Smith had not made any sale or sales in the neighborhood of the said property and had no knowledge of sales of comparable property and had no special knowledge to qualify him to form and express an expert opinion as to the value of said property mentioned and described in the alternative writ of mandamus.

23. The Trial Court erred in permitting William Smith, a witness for relators, to answer, over objection by respondent, the following question "What was the value of the Colburn property in the summer of 1937 before the building of the embankment?" his answer being "\$4,742", the objection [fol. 11] being (a) that the witness was not shown to be qualified to answer the question and (b) because it was not shown that he was familiar with values of real property in the neighborhood of the property mentioned and described in the alternative writ of mandamus herein.

24. The Trial Court erred in permitting William Smith, a witness for relators, to answer, over respondent's objec-

tion the following question "What in your opinion was the value of the property after the building of the abutment and walls in February, 1938?" which question after interrogation by the Court, was eventually answered as follows: "Well, if the present value of the property is depleted 40%, its present value would be \$2,845.20", the objection being (a) that the witness was not shown to be qualified to answer the question; (b) that he was not shown to be familiar with the values of real property in the neighborhood of the property mentioned and described in the alternative writ of mandamus herein; and (c) because even an expert would not be competent to testify to the diminution in value of the property mentioned and described in the alternative writ of mandamus herein by reason of the building of the bridge and its approach by the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, and therefore, the witness Smith was not competent to give an expert opinion as to the diminution in value of said property by reason of the building of the bridge and its approach by the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey.

[fol. 12] 25. The Trial Court erred in denying respondent's motion for a directed certification (verdict) of the following facts:

"First: The construction of the bridge and approach thereto did not deprive relators' property of light, air, view and access to which it was legally entitled.

Second: The construction of the bridge and approach did not invade any legal right appurtenant to relators' property nor injure relators' property."

because there was no dispute of any material fact and the undisputed facts required a certification as so requested.

26. The Trial Court erred in refusing to charge the jury as requested by respondent as follows:

"1. Unless the jury find that relators' property was deprived of a legal right appurtenant thereto they must find that relators' property was not injured by the construction of the bridge and its approach.

2. Relators' property was not entitled to have the adjoining premises kept open and free of structures which might interfere with air, light and view.

3. There is no right in law to a view across adjoining premises.

4. Access to property is had only by means of the street or streets upon which it abuts and lies along.

9. The jury must find by a preponderance of all the evidence that there has been a diminution in the value of relators' property due to the construction of the bridge and [fol. 13] the approach and an invasion of a legal right before they can find that relators' property has been injured."

because upon the undisputed facts and according to the law applicable, the requests were proper and the Court should have charged the jury as so requested.

John H. Pursel, Attorney for Respondent-Appellant;
Edward P. Stout, of Counsel.

IN SUPREME COURT OF NEW JERSEY, JANUARY TERM, 1938

No. 206

MARY KLEMENT et al., Relators,

vs.

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION PENNSYLVANIA-NEW JERSEY, Respondent

Argued January 20, 1938. Decided March 18, 1938

Syllabus by the Court

1. As a general rule, a landowner is not entitled to damages to his property caused by changes in grade of highways, [fol. 14] or vacation thereof by public authority.

2. But in cases arising under Chapter 297 of the Laws of 1912 (P. L., p. 527) particularly as amended by P. L. 1919, p. 151, where lands are affected by the operations of the joint commission authorized by said statutes, and in pursuance thereof, land owners are by the express language of the statute entitled to payment for damages for property injured; and mandamus will lie to compel the joint commission to take suitable proceedings for an ascertainment of such damages.

On rule to show cause for an alternative writ of mandamus.

For the relators, Robert B. Meyner.

For the respondent, John H. Pursel.

OPINION—Filed March 18, 1938

The opinion of the court was delivered by PARKER, J.:

Eight different ownership interests are represented in this case by twelve different plaintiffs, wives and husbands being joined in several instances. We take it that this joinder of the various interests is predicated on Section 4 of the Practice Act of 1912 which provides that persons interested in causes of action may join if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions. It is not entirely clear that this statute is legally applicable to proceedings in mandamus, but no objection is made, the cases are all in pari materia, and the matter is alluded to mainly with regard to its ultimate possibilities in this particular litigation.

[fol. 15] The various relators are the owners of residential properties in Phillipsburg in the immediate vicinity of a bridge across the Delaware River which has been carried above grade over some of the local streets and connects above grade with a part of the State Highway system. The bridge and the State roads are of recent construction, and in connection with that construction, and speaking generally, there were two important changes in the terrain. One change was that several minor streets in the neighborhood of the houses where the relators lived have been closed to public use. The second important change is that the State Highway, as it will be called herein for convenience, which lies between the properties of the relators and the Delaware River, is, as has been said, some twenty or thirty feet above the natural grade on an embankment at this point, the slope of which embankment stretches from the State Highway towards the rear line of the properties of the relators and has the effect of cutting off their view of the river and the country on the other side. This they claim is a substantial damage to their properties. Inasmuch as all the houses occupied by the relators face away from the river, the view that they have in the direction of the river is necessarily from their back windows or back yards; but this goes only to the quantum of the alleged injury sustained.

In this general state of affairs the relators claim that they are entitled to be paid for such damages as their respective properties have sustained because of the two general alterations just described. They demanded that the respondent the Joint Toll Bridge Commission, which has powers of condemnation, should institute proper proceedings for the [fol. 16] ascertainment of these damages. This was refused on the fundamental ground that the relators had sustained no damages for which they were legally entitled to compensation, and this question of law is the controlling issue in the present case. There appears to be no dispute whatever as to the physical facts which are stipulated in connection with maps and photographs, so the inquiry is, do relators stand on solid legal ground in insisting that this power of condemnation which the respondent possesses must, as a matter of law, be exercised with a view of ascertainment and payment of the alleged damages in question.

If this were an ordinary case of a State Highway or of a State agency or a private corporation endowed with a power of eminent domain, it is quite clear, if not indeed fundamental, that no damages have been sustained for which the parties damaged are legally entitled to compensation.

As to the embankment, it is located altogether upon lands owned or controlled by the respondent; and by its construction the relators have not suffered any damage different in essence from that which they would suffer if a private owner of that land had built a high building thereon within his proper lines and thereby interfered with their view and access of air, etc. *Hayden v. Dutcher*, 31 N. J. Eq. 217; *Engel v. Siderides*, 112 Id. 431; *Harwood ad Tompkins*, 24 N. J. Law, 425. Authorities might readily be multiplied.

As to the changes of grade and vacation of streets, it is settled, in the absence of some statute, that a landowner who has been actually damaged sustains no legal injury for which he is entitled to compensation. On this phase of the case the respondent properly cites such cases as *Cooper v. State Highway Commission*, 6 Misc., 723; *Burns v. same*, 8 [fol. 17] Misc., 452, affirmed 108 N. J. Law, 410; and *Sommer v. same*, 106 N. J. Law, 26. In regard to the vacation of streets, a leading case, and one sufficient for present purposes, is *Newark v. Hatt*, 79 N. J. Law, 548, where at page 550, the late Justice Bergen, speaking for the court of Errors and Appeals, said, in regard to the vacation of

a street, "The right of the state to destroy public improvements of this class without compensation is not limited by the constitution, and except for the statute, as expressed in the charter of the city, this street could have been vacated without the slightest consideration of its effect upon any land lying along it, or the payment by the city of compensation to any landowners for damages." To sum up on this phase of the matter, it may be said generally that in the absence of a statute, these relators would have no case for relief on the present state of facts. But there is a statute, and one that in our estimation is plain and controlling. The respondent in this case operates and has made the changes in question under and by virtue of Chapter 215 of the Laws of 1934 (P. L. 498), being "An Act providing for joint action by the State of New Jersey and the Commonwealth of Pennsylvania in the administration, operation and maintenance of bridges over the Delaware River," etc. By that act it is provided, among other things, that the Commission created thereby, and which is the respondent herein, shall have power to acquire real property (Article II (j) page 501, and Article II (m), page 502 to exercise the power of eminent domain. See also page 503 where a manner of condemnation is indicated based on Chapter 297 of P. L. 1912. Referring then to the statute of 1912 (P. L. 527) Cumulative Supplement of 1924, page 206, we find by Sec. [fol. 18] tion 3 as amended in 1919 (P. L., page 151) that the Joint Commission, acting as a judicial body, having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of the property taken including any easement, rights or franchises incident thereto, as well as the damages for property taken, injured or destroyed. This last phrase is significant and important. It constitutes a statutory recognition (or creation, if the phrase be preferred), of the right of a landowner to compensation for injury to his property which, in the absence of a statute, would not exist. This was the situation in Newark v. Hatt, *supra*, where the City charter required damages to be paid for the vacation of a street. This phrase is embedded in an amendment to the constitution of Pennsylvania, and the pertinent clause will be found quoted in Chester County v. Brower, a Pennsylvania case, 12 Atl., page 577. This was recognized and enforced by the Supreme Court of the United States in Pennsylvania Railroad Co. v. Miller, 132 U. S., 75 at page

82. In the Chester case there were abutments of a bridge in front of the plaintiff's house. In the Miller case there was an iron pillar and an abutment for a bridge as well.

It is suggested for the respondents that by the statute of 1928 (P. L., page 389) it was provided in Section 4 that the Commission may acquire land, etc. in accordance with the Eminent Domain Act of 1900; and assuming this to be still in force, the point is made that there are two alternative methods of acquiring property by the exercise of eminent domain, one under the Act of 1928, and the other under the Act of 1912 as amended in 1919; and that mandamus should not be allowed where these alternative methods exist. To [fol. 19] this we think there are two answers. The first answer is, that if the relators appear to be in fact injured by reason of the vacation of streets, changes of grade, erection of embankments, etc., as appears to be the case in view of the Act of 1912, supra, this court may, and should, direct at least that suitable proceedings be taken for the ascertainment of those damages without deciding whether the one statutory method or the other should be pursued. The second answer is, that, as we view the matter, the Act of 1928 relied on by the respondents, has been superseded by that of 1934 adopting the procedure of the Act of 1912, and is therefore, out of the case.

There is a good reason for the inclusion in the statute of this right to damage for property taken, injured or destroyed. As has been said, it is part of the constitution of Pennsylvania; and obviously the intent of the framers of the Act of 1934, which is concurrent legislation of both States, was that the same rights of property and of damages for injuries to property should obtain in both States. We are, therefore, clear that a writ of alternative mandamus should go; and inasmuch as the facts are all stipulated, there seems to be no reason why a record should not be made up at once based upon those facts and a judgment pronounced thereon according to the views that have been above expressed. But reverting to the thought first above expressed, as to several relators asserting their several rights in one action, it would seem that if this action proceed in that form it would at least create much confusion in the record. Hence, as a matter of practice, there should be an alternative writ relating to each separate property; or the parties may agree to prosecute one writ to judgment as a [fol. 20] typical case, the others to be controlled by the

result. This last is of course by way of mere suggestion, and in the interest of economy of effort and of expense.

IN SUPREME COURT OF NEW JERSEY

[Title omitted]

ALTERNATIVE WRIT OF MANDAMUS

(Issued May 19, 1938)

(Filed June 8, 1938)

NEW JERSEY, ss:

State of New Jersey to Delaware River Joint Toll Bridge Commission Pennsylvania-New Jersey, Greeting:

1. Whereas, John D. Colburn and Bessie Colburn are, and at all times herein mentioned were, the owners in fee simple of a certain house and lot in the Town of Phillipsburg, County of Warren, and State of New Jersey, which lot is laid down and designated as #99 North Main Street, [fol. 21] and which house is fully equipped with modern improvements; and
2. Whereas, prior to the construction and building of the new Easton-Phillipsburg bridge and its approach by the respondent, Delaware River Joint Toll Bridge Commission Pennsylvania-New Jersey, hereinafter referred to, relators' premises were bounded on the east by North Main Street and a high, steep, wooded hill on the opposite side of said street, and on the west, in the rear, by tracts of land occupied by buildings of varying heights separated by space between said buildings, and thus permitting to relators' premises light, air and a view of the banks of the Delaware on the opposite side of the river; and
3. Whereas, relators' premises located on North Main Street were an integral part of the North Main Street section of Phillipsburg, and were adjacent to and accessible from other parts of the Town of Phillipsburg by reason of a number of streets in the North Main Street section, among which were the following: First Street, Drinkhouse Avenue, Second Street, Broad Street, Skillman Alley, Plott's Alley, Wire Alley, Chitewink Alley, and Rose Street; and

4. Whereas, respondent, Delaware River Joint Toll Bridge Commission, a body corporate and politic, created pursuant to a compact between the State of New Jersey and the State of Pennsylvania, under an act of the legislature of the State of New Jersey, Laws of 1934, Chapter 215, page 498 (Revision of 1937-32:8-1), and an act of similar purport of the State of Pennsylvania acquired the aforesaid properties to the rear of relators' premises, and the [fol. 22] fee in whole or in part of the aforementioned streets, and the premises bordering on said street; and

5. Whereas, the respondent, Delaware River Joint Toll Bridge Commission, after the acquisition of the aforesaid properties and the fee in the above streets, built and constructed a bridge abutment, gradually ascending from street level until it reaches a height of thirty-five feet, from a point starting between Elm Street and Hess Avenue, on the west side of Howell Avenue south of relators' premises, and continuing across Second Street, along the rear of relators' property line, to the tracks of the Belyidere-Delaware Railroad, north of relators' premises, so that at a point directly to the rear of relators' premises, the fill reaches a height of approximately thirty-five (35) feet in height; and

6. Whereas, the respondent, Delaware River Joint Toll Bridge Commission, by the building of said elevated embankment or fill, solidly constructed and continuous throughout for a distance of approximately one thousand feet, and provided with no bridge, trestle, tunnel, overpass or underpass, and by reason of the complete abandonment of Wire Allen, Plotts Alley, Skillman Alley, Drinkhouse Avenue, and the partial abandonment of First Street, Second Street, lower Broad Street, and lower Chitewink Alley, has curtailed access from and to relators' premises, and has thereby caused relators' premises to be set off in an isolated section of the town, whereas formerly it was a part of the entire North Main Street section of Phillipsburg; and

7. Whereas, by reason of the construction of the hereinbefore described embankment, relators' premises have been [fol. 23] deprived of air, light and view, and have been placed in an artificially created valley where heretofore their premises were surrounded by a hill on but one side; and

8. Whereas, the curtailment of access to and from the other sections of the Town of Phillipsburg, and the obstruction of view, light and air by reason of the building of said embankment, has injured the relators' property, i. e., has depreciated the value of relators' premises so that relators' property is worth but a portion of the value the property had before the building of the abutment; and

9. Whereas, by Chapter 215 of the Laws of 1934, P. L. 498 (R. S. 1937, 32:8-1 et seq.), being "An Act providing for joint action by the State of New Jersey and the Commonwealth of Pennsylvania in the administration, operation, and maintenance of bridges over Delaware River", etc., it is provided, among other things, that the respondent Commission, created thereby, shall have power to acquire real property, article 2 (j), page 501 (R. S. 1937, 32:8-3 subd. (j)); to exercise the power of eminent domain, article 2 (m), page 502 (R. S. 1937, 32:8-3 subd. (m)), and to proceed in eminent domain proceedings pursuant to Chapter 297 of P. L. 1912 as amended in 1919 by P. L., p. 151 (R. S. 1937, 32:9-7, 32:9-8), wherein it is required that the Commission, acting as a judicial body, having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of the property taken including any easement, rights, or franchises incident thereto, as well as the damages for the property taken, injured or destroyed; and

[fol. 24] 10. Whereas, although demand therefor has been duly made by the said John D. Colburn and Bessie Colburn, said respondent, Delaware River Joint Toll Bridge Commission has failed and refused to negotiate and agree with the said John D. Colburn and Bessie Colburn for the payment or accounting to the latter of such amount as will compensate them for the diminution in value of their said lands resulting from the building of the bridge abutment which curtails access and obstructs air, light and view as aforesaid, and respondent, Delaware River Joint Toll Bridge Commission has refused to institute or diligently prosecute proceedings for the viewing of said premises and the awarding of damages as set out in accordance with the laws governing the exercise of eminent domain by said Commission; and

11. Whereas, said relators have no other adequate legal means or redress at their disposal for the protection of their rights;

12. The said relators, John D. Colburn and Bessie Colburn, charge and insist that the construction and maintenance of said abutment above described and the closing of the above named streets, with the consequent deprivation of access, light, air and view constitute an injury to said lands to the extent of a considerable diminution in the value thereof, and that the neglect and refusal of said respondent, Delaware River Joint Toll Bridge Commission, to pay relators and/or take such proceedings as are provided by law for the determination of an award of damages to the said relators, is contrary to, and in violation of, the mandates and provisions of Chapter 215 of Laws of 1934, Chapter 297 of [fol. 25] the Public Laws of 1912, and Chapter 76 of Public Laws of 1919 (Revision of 1937-32:8-1 et seq. and 32:9-1 et seq.);

We, therefore, being willing that due and speedy justice should be done on this behalf, command and strictly enjoin you, and immediately after the receipt of this writ, you do pay to relators, John D. and Bessie Colburn, by agreement, if possible, an amount equal to the extent to which the value of said relators' lands hereinbefore described have been diminished by reason of the aforesaid injury to relators' land, and upon failing to agree in that regard, to institute, prosecute and consummate proceedings for the determination of the amount to be awarded to said relators as compensation for the damage by them sustained through the said injury to their land pursuant to the provisions of the aforementioned statutes; or cause to us of the contrary thereof signify lest in your default complaint come to us repeated; and how you shall execute this, our command, certify to our Justices of our Supreme Court of Judicature, at Trenton, on June 8, 1938 together with our writ, and this in nowise omit at your peril.

Witness, Thomas J. Brogan, Esquire, Chief Justice of our Supreme Court, at Trenton, this 19th day of May, nineteen hundred and thirty-eight.

Fred L. Bloodgood, Clerk; Robert B. Meyner, Attorney.

[fol. 26] IN SUPREME COURT OF NEW JERSEY

RETURN TO ALTERNATIVE WRIT OF MANDAMUS—Filed June 8,
1938

To the Honorable Justices of the Supreme Court of New Jersey:

The Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, to which said alternative writ of mandamus is directed does herewith make return thereto to your Honors, as therein commanded, and assert and certify that:

1. Respondent has not sufficient information as to the alleged ownership in fee simple by John D. Colburn and Bessie Colburn of the premises described in paragraph one of said alternative writ of mandamus, and therefore leaves relators to their proof in that regard.

2. It is not true as stated in paragraph 2 of said writ that relators' premises were so situated prior to the construction and building of the New Easton Phillipsburg Bridge and its approach as to have been afforded light, air and a view of the banks of the Delaware River on its Pennsylvania side; the fact is that relators' premises prior to such construction fronted and abutted, and still front and abut, on North Main Street, and the rear of said premises prior to such construction adjoined lands of Austin W. Leidy, upon which were erected a brick mill building, approximately 173 feet long, 92 feet wide and 28 feet high; a brick factory building, approximately 88 feet long, 66 feet wide, and 18 feet high with certain extensions; a stone warehouse, approximately 131 feet long, 30 feet wide and 43 feet high; a barn and sheds, approximately 106 feet long, an average width of 33 feet and 30 feet high and other small structures; and the further fact is that relators' premises consist of a lot 25 feet wide and approximately 112 feet in depth upon which was and is erected an old one family house with a party wall and a frame building, near the rear line of the lot; the rear portion of the premises is sunken and is about 4 feet below the street level and prior to the said construction and building of the bridge and its approach there was a 4 foot retaining wall along the rear line of the lot and an old board fence was erected immediately adjoining the retaining wall and rising to a height of 8 feet above the same; relators' premises were

situated in a practically abandoned industrial mill and factory section of Phillipsburg adjacent to the aforesaid Leidy property, a small baseball park, enclosed with a solid board fence, 12 feet high, railroad tracks and sidings beyond and the Works of the American Horseshoe Company, situated between the railroad and the New Jersey shore of the Delaware River; all of which buildings and structures obstructed the light, air and view of relators' premises from all portions thereof except the North Main Street frontage.

3. It is not true as stated in paragraph 3 of said writ that relators' premises were adjacent to and accessible from parts of the Town of Phillipsburg by reason of a number of streets in the North Main Street section; the fact is that relators' premises were and still are only adjacent to and accessible from North Main Street.

4. It is true are stated in paragraph 4 of said writ that respondent acquired property adjoining relators' premises [fol. 28] and other properties, but it is not true that respondent acquired in whole or in part the streets named First Street, Drinkhouse Avenue, Second Street, Broad Street, Skillman Alley, Plotts Alley, Wire Alley, Chintewink Alley and Rose Street; the fact being that the said streets or portions thereof were vacated by the Town of Phillipsburg after the acquisition by respondent of the lands abutting said streets or portions thereof, and upon such vacations the lands in said streets or portions thereof reverted to the said abutting lands of respondent.

5. It is true as stated in paragraph 5 of said writ that respondent built and constructed a bridge and an approach thereto, which approach gradually ascends from the street level until it reaches a height of about 35 feet, but it is not true that any part of such approach construction is along the rear of relators' property line; the fact is that said embankment at its base is 18 feet beyond the rear lot line of relators' premises at the nearest point thereto and slopes at an angle of 34 degrees.

6. It is not true as stated in paragraph 6 of said writ that the construction of the bridge and of the approach thereto has curtailed access from and to relators' premises and caused same to be set off in an isolated section of the Town; the fact is that such construction has not curtailed access from and to relators' premises and has not caused same to be set off in an isolated section of the Town.

7. It is not true as stated in paragraph 7 of said writ that the aforesaid construction of the bridge and the approach [fol. 29] thereto has deprived relators' premises of air, light and view, and has placed relators' premises in an artificially created valley; the fact is that the embankment referred to in said paragraph is wholly on respondent's lands and its construction as above stated does not deprive relators' premises of air, light and view, and has not created an artificial valley.

8. It is not true as stated in paragraph 8 of said writ that the construction of the bridge and approach thereto has injured relators' property by depreciating its value; the fact is that such construction has in no way injured relators' premises.

9. In respect to paragraph 9 of said writ respondent asserts and certifies that under the Statutes applicable, which are P. L. 1934, Chapter 215, Revision of 1937, 32:8-1 to 15 and P. L. 1912, Chapter 297, P. L. 1919, Chapter 76, P. L. 1929, Chapter 259, Revision of 1937, 32:9-1 to 16, it has the power to acquire property by the exercise of the power of eminent domain, and to conduct proceedings in connection therewith, and has the power to view premises, examine property, hear interested parties and their witnesses, and determine the value of property taken, including any easement, rights as franchise incident thereto, as well as the damages for property taken, injured or destroyed, and for greater particularity respondent refers to the statutes applicable thereto, but respondent does not have the power under said statutes or otherwise to make compensation to relators for alleged injury to their property by the construction of said bridge and approach thereto.

10. It is true as stated in paragraph 10 of said writ that relators made demand upon respondent to negotiate and [fol. 30] agree with them for the payment of an amount of money to compensate them for alleged depreciation in value of their lands resulting from the building of the bridge and the approach thereto, and that respondent refused to institute or prosecute proceedings for the viewing of relators' premises, and award of damages in the exercise of respondent's power of eminent domain; but respondent refused for the reason that, as above set forth, relators' property was so situated as not to have been injured or damaged in any way by reason of the acquisition of lots and premises by respond-

ent or by the closing or vacation of said streets or portions thereof, and for the further reason that respondent did not have the power to make any compensation to relators as above stated.

11. It is not true as stated in paragraph 12 of said writ that relators' premises were deprived of access, light, air and view, and were diminished in value by reason of such construction; respondent is not empowered to pay relators any sum of money or conduct proceedings for the determination of an award for alleged damages to relators' premises.

Respondent further asserts and certifies that:

12. The respondent acquired the lands in the Town of Phillipsburg upon which the bridge and the approach thereto have been constructed, in fee, by deeds from various grantors and not by condemnation proceedings.

13. Relators did not have any easement or other right in and to any of the property so acquired by respondent.

[fol. 31] 14. The respondent did not take relators' property or any easement, right or franchise belonging to relators incident to any property acquired.

15. The respondent did not take, injure or destroy any property, easement, right or franchise of relators.

16. Relators' alleged damages are not peculiar or specific, but are general, vague and inconsequential, and relators are not entitled to compensation therefor.

This respondent therefore humbly prays that said writ be dismissed and that it be relieved from obeying the command therein given and that the writ be dismissed with reasonable costs to be taxed.

Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, by John H. Pursel, Attorney of Respondent.

[fol. 32] IN SUPREME COURT OF NEW JERSEY

RELATORS' REPLY TO RETURN—Filed June 27, 1938

To the Honorable Justices of the Supreme Court of New Jersey:

The relators, John D. Colburn and Bessie Colburn, by way of reply to the return to the alternative writ filed by re-

spondent, Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, state:

1. Relators have not sufficient information as to the dimensions and precise locations of the various buildings, structures and retaining wall described in paragraph 2 of the return filed by respondent, and therefore leave the respondent to its proof in that regard; relators deny their premises are sunken and were about four feet below the street level prior to the construction of the bridge and its approach; relators further deny that relators' premises were situated in a practically abandoned mill and factory section of Phillipsburg, and that the locations of all the buildings and structures in the neighborhood obstructed the light, air and view of relators' premises from all portions thereof except the North Main Street frontage.

2. Relators deny the truth of such new matter as is set up in paragraph 3 of the return.

3. Relators deny the truth of such new matter as is set up in paragraph 6 of the return.

[fol. 33] 4. Relators deny the truth of such new matter as is set up in paragraph 7 of the return.

5. Relators deny the truth of such new matter as is set up in paragraph 8 of the return.

6. Relators deny respondent's allegations in paragraph 9 of the return to the effect that it has no power to make compensation, or pay damages to relators.

7. Relators deny the truth of such new matter as is set up in paragraph 11 of the return.

8. Relators neither deny nor admit the allegations of paragraphs 13 and 14 of the return, but leave respondent to its proof in that regard.

9. Relators deny paragraph 15 and 16 of the return.

Relators further state:

10. There were buildings and structures to the rear of relators' premises as set out in paragraph 2 of the return, but said buildings and structures were sufficiently distant and of broken continuity so as not to affect materially light, air, and view of the banks of the Delaware on the opposite side of the river.

Robert B. Meyner.

[fol. 34] IN SUPREME COURT OF NEW JERSEY

RESPONDENT'S REPLY TO RELATORS' "REPLY TO RETURN"—
Filed July 16, 1938

And the respondent, Delaware Joint River Toll Bridge Commission, Pennsylvania-New Jersey, replies to the relators' "reply to return" to the alternative writ, and says that:

Relators' "reply to return" admits the alleged damages to relators' premises did not result from the taking or acquisition of the lands and premises by respondent, or from the closing or vacation of the streets, in whole or in part, but resulted solely from the construction of the bridge and its approach after the acquisition by respondent of the lands and premises upon which the bridge and its approach were constructed; and relators' "reply to return" does not traverse, but, impliedly and in effect, admits that relators did not have any easement or other right in and to any of the property acquired by respondent, and that respondent did not take relators' property or any easement, right or franchise belonging to relators incident to any of the property acquired; therefore, and by reason of the status of the pleadings, respondent is ready to verify and prove by affidavits or depositions the assertions set forth in its return to the alternative writ of mandamus, and will apply to the court for leave to take same for use in the argument of this cause.

Wherefore, the respondent humbly prays, as in its return, that said writ be dismissed and that it be relieved from obeying the command therein given and that the writ be dismissed with reasonable costs to be taxed.

John H. Pursel, Attorney for Respondent.

[fol. 35] IN SUPREME COURT OF NEW JERSEY

RELATORS' REPLY TO "REPLY TO RELATORS' 'REPLY TO RETURN'"—Filed August 4, 1938

The relators John D. Colburn and Bessie Colburn, by way of reply to the allegations of the Reply to Relators' "Reply to Return", filed by respondent, Delaware River Joint Toll Bridge Commission Pennsylvania-New Jersey, state:

Relators deny the allegations contained in the Reply to Relators' "Reply to Return".

Robert B. Meyner, Attorney for Relators.

IN SUPREME COURT OF NEW JERSEY

Postea—Filed November 23, 1938

The disputed questions of fact raised by the alternative writ of mandamus, the return thereto, the reply, and "reply to return" in the above entitled cause were tried before J. Wallace Leyden, Esq., Circuit Judge and a jury at the Warren Circuit on October 10th, 11th and 13th, 1938. Upon application duly made, the jury as a body was permitted to and did visit and view the premises in question.

[fol. 36] THE FOLLOWING FACTS WERE FOUND BY THE COURT TO BE UNDISPUTED:

1. John D. and Bessie Colburn were for nineteen years last past, and are now, in possession of a certain house and lot in the Town of Phillipsburg, County of Warren and State of New Jersey, which lot is laid down and designated as 99 North Main Street, and which house is fully equipped with modern improvements, by virtue of the following instruments:

A. Carrie Kiefer, spinster, by warranty deed dated September 30th, 1919, conveyed to John D. Colburn and Bessie Colburn, his wife, for one dollar and other good and valuable consideration the premises in question. This deed was acknowledged on September 30th, 1919, before Clement B. Flitcraft, a notary public of Illinois, and a County Clerk's certificate was attached thereto. This conveyance was recorded in the Warren County Clerk's Office on November 7th, 1919, in Book 215 of Deeds, page 429, etc.

B. John D. Colburn and Bessie Colburn, his wife, by warranty deed dated October 19th, 1936, conveyed to Willis Van Gorden and Elizabeth Van Gorden, his wife, for one dollar and other good and valuable consideration the premises in question. This deed was acknowledged on October 19th, 1936, before George W. Fleming, attorney-at-law of New Jersey. This conveyance was recorded in the Warren County Clerk's Office on October 23rd, 1936, in Book 281 of Deeds, page 127, etc.

C. On the date of the execution of Deed #2, the grantors [fol. 37] and grantees entered into the following agreement with respect to the premises in question:

Memorandum of Agreement, made this Nineteenth day of October, One Thousand Nine Hundred and Thirty-six, between Willis Van Gorden, and Elizabeth Van Gorden, his wife; of the Township of White, in the County of Warren, and State of New Jersey, party of the first part; and John D. Colburn, and Bessie Colburn, his wife, of the Town of Phillipsburg, in the County of Warren, and State of New Jersey, party of the second part;

Whereas, the party of the second part has this day conveyed to said party of the first part, a certain lot located in the Town of Phillipsburg, in the County of Warren, and State of New Jersey, more fully described in a deed dated September 30, 1919, made by Carrie Kiefer, a single woman, to John D. Colburn, and Bessie Colburn, his wife, which said deed is recorded in the Warren County Clerk's office in Book 215 of Deeds, pages 429 etc., to which for greater certainty reference may be thereto had.

Now, therefore, the party of the first part, for and in consideration of the conveyance to them of the aforesaid property, by Deed bearing even date herewith, and the further consideration of One Dollar, the receipt of which is hereby acknowledged, hereby agree with the party of the second part, that they will reconvey the said property this day conveyed to them by the party of the second part within the [fol. 38] term of two years from the date hereof, upon the party of the second part paying to the party of the first part the sum of Eighteen Hundred (1800) Dollars, together with interest from the date hereof at the rate of six per centum per annum, and also by paying any sums the party of the first part may expend for taxes assessed against said property, insurance premiums, provided; however, interest is to be added on such expenditures from the date of their payment. And, it is further agreed that the party of the second part shall give the party of the first part ten days' notice, prior to the 19th day of September, 1938, of their desire to redeem the property at the expiration of two years.

It is further agreed that the party of the second part is to have full and uninterrupted possession of the premises during the period of this agreement; and it is further agreed that, if the party of the second part shall pay to the party of the first part, interest quarterly on the aforesaid principal sum, the first interest to be due and payable on January 15, 1937, and thereafter on the Fifteenth day of April, July and October in each year; and shall also pay the taxes,

keep the property in repair, pay the insurance premiums when due; that this agreement shall be extended for a further period of one year, and from year to year thereafter, subject to the approval of the party of the first part; and, if the party of the first part shall desire to discontinue this agreement, or to sell the property, they shall give the party [fol. 39] of the second part at least thirty days' notice, in writing, prior to the fifteenth day of October, in any year, after the first two years, that they do not wish to continue the agreement; and, upon receipt of such notice and at the expiration of the said period which the notice calls, the party of the second part will pay the sums herein agreed to, and shall be entitled to receive a deed for the said property; and, upon failure of their carrying out the terms of this agreement, and complying with the request, they hereby give the party of the first part, their heirs or assigns the right to re-enter the said premises and to remove all persons therefrom without any other legal action being taken, hereby discharging them from any claim or right of action, or liability, or damage they may or could have against them; and, it is further agreed that the party of the second part will at all times keep the premises in proper repair and will use them for legitimate purposes only.

This instrument was not recorded.

D. Willis Van Gorden and Elizabeth Van Gorden, his wife, by warranty deed dated October 12th, 1938, conveyed to John D. Colburn and Bessie Colburn, his wife, for one dollar and other good and valuable consideration the premises in question. This deed was acknowledged on October 12th, 1938, before George W. Fleming, attorney-at-law of New Jersey. This conveyance was recorded in the Warren County Clerk's Office on October 13th, 1938, in Book 288 of Deeds, page 557, etc.

[fol. 40] E. John D. Colburn and Bessie Colburn, his wife, executed a mortgage, October 12th, 1938, to Willis Van Gorden and Elizabeth Van Gorden, his wife, on the premises in question. This mortgage was acknowledged on October 12th, 1938, before Bessie S. Fritts, a notary public of New Jersey. It recited an indebtedness of Eighteen Hundred (\$1800.00) Dollars due on October 15th, 1939, with interest from October 15th, 1938, at six per cent per year, payable quarterly. This mortgage was recorded in the Warren

County Clerk's Office on October 13th, 1938, in Mortgage Book 144, page 234, etc.

2. That the relator's premises did not have any easement appurtenant thereto in respect to any premises acquired by respondent, and upon which the said bridge and its approach were constructed.

3. THE JURY, IN RESPONSE TO SIX DISPUTED QUESTIONS SUBMITTED BY THE COURT, FOUND THE FOLLOWING MATTERS OF FACT:

A. The erection of the bridge and the construction of the approach thereto has deprived the relator's real property of the light, air and view of the opposite bank of the Delaware River it formerly had.

B. The relators' real property was an integral part of the North Main Street section of Phillipsburg, and it was adjacent to and accessible from other parts of the Town of Phillipsburg via First Street, Drinkhouse Avenue, Second Street, Broad Street, Skillman Alley, Plotts Alley, Wire Alley, Chintewink Alley and Rose Street.

C. Access to and from relators' real property has been [fol. 41] curtailed by the construction of the bridge approach and the abandonment in whole or in part of said streets, and relators' real property thereby has been set off in an isolated section in the Town of Phillipsburg.

D. The relators' real property has been deprived of light, air and view, and it has been placed in an artificially created valley by the construction of the bridge and the approach thereto.

E. The relators' real property has been injured, i. e., depreciated in value by reason of the curtailment of access thereto by the construction and maintenance of the bridge and the approach thereto.

F. The relators' real property has been injured, i. e., depreciated in value by reason of the curtailment of light, air and view, by the construction and maintenance of the bridge and the approach thereto.

J. Wallace Leyden, Circuit Judge.

[fol. 42] IN SUPREME COURT OF NEW JERSEY

RULE FOR JUDGMENT—Filed December 17, 1938

It appearing that the fact issues raised on the pleadings in this case were noted for trial at the Warren County Circuit of the Supreme Court, and were tried on October 10, 11 and 13, 1938, with a Jury by Honorable J. Wallace Leyden, Circuit Court Judge and Supreme Court Commissioner, which determination of facts as found by the Court and Jury were certified to the Supreme Court by Postea duly filed with the Supreme Court Clerk on November 23, 1938; and the matter coming on to be heard before the Supreme Court on December 15, 1938, and it appearing to the Court that the alternative writ of mandamus by the said relators presented is good and sufficient in law, and that on the basis of the writ and the facts as certified by the Postea that the relators are entitled to the relief prayed, and that a peremptory writ should issue out of and under the seal of this Court,

Therefore it is ordered that a peremptory writ of mandamus issue out of and under the seal of this Court, directed to the said Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, commanding it to pay to relators, John B. Colburn and Bessie Colburn, by agreement, if possible, an amount equal to the extent to which the value of relators' property has been diminished by reason of the building of a bridge abutment to the rear of relators' land, and upon failing to agree in that regard, to institute, prosecute and consummate proceedings forthwith for the de- [fol. 43] termination of the amount to be awarded to said relators as compensation for the damages by them sustained through the injury to their land pursuant to the provisions of Chapter 215 of Laws of 1934 (R. S. 1937, 32:8-1 et seq.), providing for proceedings according to Chapter 297 of P. L. 1912 as amended by Chapter 76 of P. L. 1919 (R. S. 1937, 32:9-1 et seq.).

Entered December 17, 1938.

On motion of,

Robert B. Meyner, Attorney.

IN SUPREME COURT OF NEW JERSEY

JUDGMENT—Filed December 17, 1938

This matter having been originally instituted by Mary Clement and others, including John D. Colburn and Bessie Colburn, all alleged real property owners on North Main Street, in the Town of Phillipsburg, County of Warren, and State of New Jersey, against the respondent, Delaware River Joint Toll Bridge Commission Pennsylvania-New Jersey, on a rule to show cause why an alternative writ should not issue out of and under the seal of this Court; and the rule to show cause having been heard by the Supreme Court at the January term, and the Court having been attended at that time by Robert B. Meyner, attorney for the relators, for the rule, and John H. Pursel, attorney [fol. 44] for the respondent, contra, and the Court having heard oral argument of counsel, and having considered the stipulation of facts and briefs submitted; and it further appearing that the Court, on March 18, 1938, filed its opinion indicating that alternative writs of mandamus should issue in favor of the relators individually without the joinder of all relators in one suit; and it further appearing that the Supreme Court, on the eleventh day of May, 1938, ordered that eight separate alternative writs of mandamus issue out of this Court against the Delaware River Joint Toll Bridge Commission Pennsylvania-New Jersey, in favor of the eight individual property owners, and among such property owners were included John D. Colburn and Bessie Colburn; and it further appearing that these alternative writs were ordered to the end that a record be framed in each case as a basis for any further proceedings by way of review of the decision of this Court; and it further appearing that pursuant thereto, an alternative writ of mandamus, on behalf of John D. Colburn and Bessie Colburn, was issued out of this Court on the nineteenth day of May, 1938, directed to the Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, commanding that the said respondent do pay to relators by agreement, if possible, an amount equal to the extent to which the value of said relators' land had been diminished by reason of the building of a bridge abutment to the rear of relators' land, and upon failing to agree in that regard, to institute, prosecute and consummate proceedings for the determination of the amount to be

awarded to the relators as compensation for the damage by them sustained through the injury to their land, pursuant to the provisions of Chapter 297, P. L. 1912, as amended in [fol. 45] 1919, by P. L. of 1919, page 151 (R. S. 1937, 32:9-7, 32:9-8), or signify to the Court the cause of not complying; and it further appearing that by the subsequent pleadings, the respondent denied the legal right of relators to the remedy sought, and denied certain facts raised in the alternative writ.

And it further appearing that the fact issues raised on the pleadings were noticed for trial at the Warren County Circuit of the Supreme Court, and were tried on October 10, 11 and 13, 1938, with a Jury by Honorable J. Wallace Leyden, Circuit Court Judge and Supreme Court Commissioner, which determination of facts as found by the Court and Jury were certified to the Supreme Court of Postea duly filed with the Supreme Court Clerk on November 23, 1938.

And now this day, to wit, the 15th day of December, 1938, before the Supreme Court of New Jersey, at Trenton, comes as well the said John D. Colburn and Bessie Colburn, relators, by their attorney, Robert B. Meyner, and the respondent, Delaware River Joint Toll Bridge Commission Pennsylvania-New Jersey, by its attorney, John H. Pursel, whereupon, it appearing to the Court that the alternative writ of mandamus by the said relators presented is good and sufficient in law, and that on the basis of the writ and the facts as certified by the Postea that the relators are entitled to the relief prayed, and that a peremptory writ should issue out of and under the seal of this Court,

Whereupon, it is adjudged that a peremptory writ of mandamus issue out of and under the seal of this Court, directed to the said Delaware River Joint Toll Bridge Commission Pennsylvania-New Jersey, commanding it to pay to [fol. 46] relators, John D. Colburn and Bessie Colburn, by agreement, if possible, an amount equal to the extent to which the value of relators' property has been diminished by reason of the building of a bridge abutment to the rear of relators' land, and upon failing to agree in that regard, to institute, prosecute and consummate proceedings forthwith for the determination of the amount to be awarded to said relators as compensation for the damages by them sustained through the injury to their land pursuant to the provisions of Chapter 215 of Laws of 1934 (R. S. 1937,

32:8-1 et seq.) providing for proceedings according to Chapter 297 of P. L. 1912 as amended by Chapter 76 of P. L. 1919 (R. S. 1937, 32:9-1 et seq.).

For the Court,

Thomas J. Brogan, C. J.

Judgment signed December 15th, 1938.

Judgment actually entered Dec. 17, 1938.

[fol. 47] IN SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1938

No. 3. Warren Circuit

On Mandamus

JOHN D. COLBURN and BESSIE COLBURN, Relators,

vs.

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION PENNSYLVANIA-NEW JERSEY, Respondent

Statement of Evidence

Transcript of shorthand notes of testimony etc., taken in the above entitled cause on the trial thereof, before Hon. J. Wallace Leyden, Circuit Court Judge, and a jury, at the Court House, Belvidere, New Jersey, on Monday, October 10, 1938.

APPEARANCES

Robert B. Meyner for the Relators.

John H. Pursel, Edward P. Stout and John W. Oakford, for the Respondent.

COLLOQUY

The Court: Do I understand that cases numbered 2 and 3 are to be tried together?

Mr. Stout: May it please the Court, I did not intend that they would be tried together. There are separate findings in each case. The facts are different.

[fol. 48] The Court: The only reason I said that was that I have noted on this calendar, "To be tried together". I have no idea.

Mr. Stout: It seems to me, may it please the Court, that upon the granting of an alternative writ of mandamus by the Supreme Court, the Supreme Court said that there ought to be a writ in each case, that there ought to be a separate proceeding in each case. We are here now before the Court on the question of finding facts and it seems to me we will have to have a separate finding in each case and they cannot be tried together.

The Court: Could they be tried separately together—have the jury find in each case? There is a common question of fact and law involved, is there not?

Mr. Meyner: And in addition to that I have my experts and I am trying to arrange to have them at one time.

The Court: If you insist on having them tried separately, it is all right with me.

Mr. Stout: I think, to make an intelligent disposition, they should be tried that way.

The Court: All right. Are you ready in number 2?

Mr. Meyner: I would rather try No. 3 first.

The Court: All right. A jury may be returnd in the case of Colburn vs. Delaware River Joint Toll Bridge Commission.

(The Court proceeded to impanel a jury.)

Mr. Pursel: Are any of you jurors clients of Mr. Meyner?

Mr. Meyner: If your Honor please, I think that is objectionable, under the cases.

The Court: I will allow it.

Mr. Meyner: Very well.

The Court: I will allow you an exception.

Mr. Meyner: If your Honor please, if I am in order, I [fol. 49] should like before the swearing of the jury to make a motion to have the cases consolidated. I have been thinking very seriously of the amount of evidence that will have to go in, and it will be purely repetition.

The Court: Assuming that it is, I think if counsel objects we will have to try them separately.

Mr. Meyner: Of course, there are common questions of fact.

The Court: I will assume that you have made a motion to consolidate and I will deny it and you may have an exception.

(Jury was sworn.)

Mr. Meyner: At this time, if your Honor please, I would like to move the Court that the jury be given an opportunity during the course of this trial to view the premises involved in this litigation. I believe it would be helpful for them to appreciate the condition which we allege has been caused by the building of the abutment.

Mr. Pursel: I think that decision should wait until the proof develops. It would not seem to be necessary to have them go now.

The Court: The usual course is to open the case and let them go and look at it. I think it will be better for them to understand what you are talking about. I am inclined to let them go down. Have you made arrangements?

Mr. Meyer: No, I have not.

The Court: You better get a bus, then.

Mr. Meyner: I think we can probably get some cars. The Sheriff's office probably has one, and I will let someone use my car, if that would not be prejudicial.

The Court: We usually take them in a bus, to keep them together. Is there any bus for hire in Belvidere that we can get reasonably?

[fol. 50] Mr. Meyner: I believe a good many of them have cars and could get there themselves.

The Court: No. I want them kept together. I do not want them running around loose after I once let them go away from here. You better make arrangements if you want to take them down. I am willing to let them view the place, but I think they should all be kept together. There are twelve jurors and there ought to be two showers, that would be fourteen; and you would need at least two big cars or a bus.

Mr. Meyner: It would be rather expensive to get a bus right now. If your Honor would consent to three cars I think the jurors themselves could arrange their transportation.

Mr. Pursel: Your Honor, we might get a bus from the Interurban Coach Company. They charter buses.

The Court: Well, see what you can do, anyway. How far is it from here?

Mr. Pursel: Twelve miles.

The Court: That would be about an hour and a half?

Mr. Meyner: Yes, sir.

(Mr. Meyner opened for the Relators.)

(Mr. Pursel opened for the Respondent.)

Mr. Meyner: If your Honor please, the Sheriff informs me that a school bus can be gotten just outside and will be available in ten or fifteen minutes.

I have one other request. I have a witness here who will testify to some recent sales and to that alone, and he would like to get away, and I would like to put him on the stand first.

The Court: I think he better wait until the jury comes back.

Mr. Pursel: If they care to see now how the premises look and how they looked before the bridge was built—it might [fol. 51] be wise to have some explanation of how it appeared before and after.

Mr. Meyner: I think we can show the condition before by putting in some photographs that we have.

Mr. Pursel: I think it should be shown in more detail than that.

The Court: We are going to get involved here if we do not go on in an orderly way. Do you want to put in some of your proof now?

Mr. Pursel: I do not care whether I put it in or whether Mr. Meyner puts it in. It seems to me that offering the photographs is not enough.

The Court: Somebody could explain it, I suppose.

Mr. Meyner: That (indicating) we prepared for use in the Supreme Court argument.

The Court: There are a lot of notations on it. Do you wish him to put in these photographs now and have someone explain it?

Mr. Pursel: I think it should be gone into in more detail than that, if we are going to do it. There is no use giving them just a very slight picture of it which will not be accurate.

The Court: We will let them go and view the place as it is now, only for the purpose of better understanding what you are going to tell them later on as a matter of proof or evidence.

Mr. Meyner: I would like to have them, if possible, go into the one house I am complaining of.

The Court: The Colburn house?

Mr. Meyner: Yes, sir.

The Court: I suppose that would be proper, would it not?

Mr. Pursel: We do not want to conceal anything. It is a dwelling house.

The Court: There is an allegation that it is improved and well kept and so forth.

[fol. 52] Mr. Pursel: We do not object to that.

The Court: Who will be the showers? You, Mr. Pursel?

Mr. Pursel: Yes, sir.

The Court: And you, for your side, Mr. Meyner?

Mr. Meyner: Yes, sir.

The Court: You are not to talk to the jury. You will merely point out the site.

And you, members of the jury, are not to talk among yourselves. You are going there to take a view of the place so that ultimately you will better understand the proof presented to you in the court room, under the guidance of the Court. You are to go there just to view it. They can point out to you, I suppose, the view that they say they used to get from the windows, and what not.

Mr. Stout: It seems to me that it is not the province of counsel on either side to do further than point out to the jury, "This is the Colburn property". They will look at the surroundings and look at the house. I say if counsel is going to do the directing of the jury to look at the property, all they can do is point out the property and let the jury do the rest.

The Court: Yes. I think they can point out the directions—The Delaware River lies in such and such a direction. I suppose they would be entitled to look over the location where the streets were.

Mr. Pursel: We can take them up on the embankment I think.

The Court: And that by virtue of the closing of the streets, where they have been damaged—to show them that territory. I will leave it to counsel. I think they will conduct themselves with propriety.

[fol. 53] Mr. Pursel: I do not think we should go through every nook and corner of the Colburn house. What is your idea?

Mr. Meyner: To let Mrs. Colburn stay on the front porch and let them walk through.

Mr. Pursel: I did not know she was going with us. Is she?

Mr. Meyner: She will have to open the door.

The Court: Well, you may go now.

(The jury retired and a recess was taken from 11:15 o'clock in the forenoon until 12:30 o'clock in the afternoon.)

(The jury returned into Court.)

Mr. Meyner: If the Court please, will you bear with me a few minutes until I get some of the witnesses?

The Court: All right.

Mrs. BESSIE COLBURN, sworn for the Relators.

Direct examination.

By Mr. Meyner:

Q. Mrs. Colburn, where do you live?

A. 99 North Main Street.

Q. How long have you lived there?

A. Nineteen years the tenth of November.

Q. Did you and your husband acquire the place by deed?

A. By deed.

Q. (Showing witness paper.) Is this a copy of the deed or the deed you received at the time you purchased the property?

A. Yes.

Mr. Meyner: I offer this in evidence.

(Paper referred to and offered in evidence is marked Exhibit P-1.)

[fol. 54] Q. Did you recently borrow some money on this property?

A. Yes.

Q. From whom did you borrow it?

A. Willis Van Gorden.

Q. Did you and your husband give them a conveyance of this property?

A. Yes.

Q. And did they at the same time execute an agreement to reconvey?

A. Yes, sir.

Q. (Showing witness paper.) Is this the agreement executed at that time?

A. Yes, sir.

Q. I show you these signatures attached. Were they signed in your presence?

A. Yes, sir.

Q. Who was their attorney?

A. George Fleming.

Q. Did you see him sign that?

A. Yes, sir.

(Mr. Meyner hands paper to Mr. Stout.)

Mr. Stout: If the Court please, I take it that this agreement would not be evidential unless the deed of the Colburns to Van Gorden is first in evidence. As I take it from what has been disclosed here, Will's Van Gorden and his wife are the owners of record of this property, and that to my mind raises a very serious question as to whether that deed or this agreement are relevant to the issues here for determination.

The alternative writ of mandamus alleges that the relators, John Colburn and Bessie Colburn are the owners in fee simple of a certain house and lot in the Town of Phillipsburg, describing them. The fact is that they are not the owners in fee simple of these premises, because the witness has testified it has been conveyed away, the title to these premises, to someone under an agreement whereby [fol. 55] the holder of the title to these premises will convey it back to relators under certain conditions.

If the relators succeed in their case it will mean that the Supreme Court will command the Bridge Commission to institute condemnation proceedings to determine the injury to owners of the property. A search of the record will disclose that the Colburns are not the owners of this property, and the Van Gordens are, and it does not seem to me that in this stage of the proceedings— On this question all that the jurors can find is that the Colburns are not the owners in fee simple of the premises, and I take it that this Court cannot amend the writ and put in the proper parties that should have instituted these proceedings, that is, the Van Gordens.

We have cases of record where the Circuit Court on the trial of issues of fact of this kind cannot amend the pleadings. You have got to go back to the Supreme Court, if

they are amendable, and have them amended by the Supreme Court and then go back to the Circuit Court to have the case tried on the real issue.

The Court: What have you to say to this?

Mr. Meyner: If your Honor please, about ten days ago I discovered this and brought it to the attention of counsel for the respondent and I told them I thought it was purely a technical objection and they told me to go ahead and prove it that way. Last Friday afternoon I got word that counsel were going to rely on the right to object. It seems to me it is possible to allow an amendment since no prejudice or [fol. 56] harm has been done to the respondent in this case. I informed them of it. It seems to me it would be perfectly proper for this Court to send back a special verdict to the effect that the Colburns had conveyed this property and contemporaneously with the execution of the deed of conveyance there was an agreement to reconvey upon the payment of the amount of money loaned. It seems to me it is purely a technical objection. If counsel desires to go back to the Supreme Court and try this over on a technicality it seems to me it is taking advantage of the situation. It seems to me that the pleadings can be amended in the trial to conform to the facts.

The Court: Your first allegation in the alternative writ is to the effect that Mr. and Mrs. Colburn are the owners in fee simple. Now it appears they are not. They may never be. They were, but they are not now and they may never be.

(After discussion.)

Mr. Meyner: It seems to me the duty of this Court is to find the facts and certify them back to the Supreme Court.

The Court: Have you your deed, from the Colburns to Van Gorden?

Mr. Meyner: I can send down to the County Clerk's office and have it brought up here immediately.

The Court: Let me see the agreement.

Mr. Meyner: Here is a letter from Mr. Fleming which I intended to offer in evidence.

The Court: As far as the jury is concerned a recess will be taken until two o'clock.

[fol. 57] (The jury retired.)

(After further discussion.)

The Court: How can I amend the alternative writ of mandamus?

Mr. Stout: I am counsel in this case. I do not know what Mr. Ockford may have said to Mr. Meyner, but the fact is that even if counsel would consent I do not see how your Honor could do it. I said to Mr. Meyner this morning that he will have to go ahead and allege the facts.

The Court: I will have to report to the Supreme Court, apparently, the fact of whether or not Colburns are the owners in fee simple of this land, because you say you have no knowledge and leave them to their proof. Now, their proof indicates that at some time not disclosed they conveyed their interests to Willis Van Gorden and Elizabeth Van Gorden who, in turn, on the nineteenth day of October, 1936, entered into an agreement with the Colburns that if the amount of a loan, to wit, \$1900 with interest and a lot of other conditions, was paid—that is two years, is it not?

Mr. Meyner: I think that is in the last paragraph there.

The Court: There is a provision in here that the Colburns will give to the Van Gordens ten days notice prior to the nineteenth of September 1938, of their desire to redeem the property.

Mr. Meyner: Of course, that is altered by—

The Court: And if the Van Gordens desire to discontinue their agreement and sell the property they shall give the Colburns at least thirty days' notice, in writing, prior to [fol. 58] the fifteenth day of October in any year after the first two years, that they do not wish to continue the agreement.

Mr. Meyner: If your Honor please, I have no objection to there being a finding that they are not the owners in fee, but I would like to be able to have it certified back—

The Court: Are we not going to get into a lot of collateral here about whether or not this mortgage is about to be foreclosed?

Mr. Stout: I do not see how anyone could be the relator in this case, so far as the record is concerned, except Van Gorden.

The Court: That seems to me to be right. Assuming you take this deed of the Colburns to Van Gorden and read them together, you spell out a mortgage.

Mr. Meyner: If your Honor please, I have this letter saying it is all right for the Colburns to go ahead on behalf of the Van Gordens.

The Court: That is very gracious of Mr. Fleming, but what are we going to do about it?

Mr. Meyner: I feel that if the Supreme Court gets the record certified back, and the facts as they are, then it will determine whether these people have a standing or have a right to ask to have an alternative writ of mandamus issue.

The Court: In other words, do you think we should in the postea report the fact they are not the owners?

Mr. Meyner: Yes, sir.

The Court: Then the Supreme Court would say, "What did Judge Eyden go on with this for then, why did he waste his time and our time with it?"

[fol. 59] (After discussion.)

Mr. Meyner: All I am interested in is getting the facts before the Supreme Court, as to who owns what.

The Court: I am inclined to take the view now—of course, I am not definite about it—that with a showing such as this you are practically out, because the record title is in someone else. Has this (indicating) been recorded?

Mr. Meyner: No, it has not.

The Court: Then they may be out in nine days from now—October nineteenth—and they would have no further interest. You are trying to spell out that it is the property and not the owner that is interested?

Mr. Meyner: That is right.

The Court: Unless you convince me you have a right to go on I am inclined to stop this right away. We will recess until two o'clock.

(At 1:00 o'clock in the afternoon a recess was taken until 2:00 o'clock in the afternoon.)

(After recess.)

(Court and counsel confer in chambers.)

(Court and counsel return into Court.)

The Court: I do not suppose there will be any serious dispute about this record of the deed as recorded in the County Clerk's office?

Mr. Stout: No.

Mr. Meyner: I will offer in evidence deed number 46830, [fol. 60] Deed Book 281, Page 127, of the County of Warren,

by which John D. Colburn and Bessie Colburn his wife convey premises on North Main Street in Phillipsburg—

The Court: They are the premises in question, are they not?

Mr. Meyner: Yes, sir. —to Willis Van Gorden and Elizabeth Van Gorden, husband and wife, for the sum of one dollar and other good and valuable consideration,

The Court: On what date?

Mr. Meyner: The deed was dated October 19, 1936, and recorded October 23, 1936. It was a warranty deed signed by both Colburns and acknowledged before George W. Fleming, attorney at law.

Mr. Pursel: And the date of the acknowledgment?

Mr. Meyner: The date of the acknowledgment was the nineteenth day of October 1936. I offer this in evidence.

The Court: Have you any objection?

Mr. Stout: No.

The Court: It may be marked.

(Paper referred to is marked Exhibit P-2.)

Mr. Meyner (producing paper): I offer this in evidence.

Mr. Stout: I object to the receipt of this paper in evidence.

The Court: Has it been properly identified?

Mr. Meyner: Yes. I asked Mrs. Colburn whether she was present when the parties signed it and whether Mr. George Fleming witnessed it.

[fol. 61] The Court: Is that the memorandum?

The Witness: Yes, sir.

Mr. Stout: I am not objecting to the execution of the paper. I am objecting to its relevancy. The alternative writ of mandamus in this case was issued by the Supreme Court upon a stipulation of fact that the Colburns were the holders of record of the property at the time the Supreme Court directed the issuing of the alternative writ of mandamus. The fact is as now disclosed that the Van Gordens were the record holder of the title to these premises on the date when the Supreme Court directed the issuing of this alternative writ of mandamus. Therefore, we have here in Court now, as I see it, a different actor than the one who is the relator, because the record title is and was in the name of the Van Gordens at the time this writ was issued, and I think that is dispositive of the case that this matter was sent to this Court, or rather issue was joined

on, whether the Colburns were the record owners of this property or the owners in fee of this property, and the record title shows that they were not.

The Court: It may be marked in evidence and you may have an exception.

(Paper referred to and offered in evidence is marked Exhibit P-3.)

Q. Has the interest on the money loaned to you by the Van Gordens been paid to date?

Mr. Stont: Objected to as immaterial.

The Court: Yes. I will sustain the objection. You may have an exception.

[fol. 62] Q. How long have you lived on North Main Street?

A. Nineteen years.

Q. What does your house consist of?

A. Five rooms and bath downstairs and four rooms and bath upstairs and a hall and attic and cellar.

Q. Do you rent the upstairs?

A. We do.

Q. To whom?

A. Carl Colburn.

Q. Does your home have modern improvements?

A. Yes, sir.

Q. What improvements does it have, both up and down?

A. Gas and electric and hot water and heat.

Q. What sort of a heater?

A. A hot water heater.

Q. Does it circulate throughout the house?

A. Yes.

Q. Now, before the building of the bridge abutment what sort of view did you have from the rear?

A. We had—we could see College Hill and across the river and up Broad Street all the way from the downstairs windows.

Q. What is your view now?

Mr. Stont: May it please the Court, it seems to me that that is too general a question—What was the view; that is what, if anything, obstructed their view before this bridge approach was constructed.

The Court: You may cross examine about that.

Mr. Stout: Yes, but to say, "What view—"

The Court: I think you can take care of that very well, on cross examination.

Mr. Stout: All right.

Q. Were there any buildings to the rear of your property [fol. 63] prior to the building of the bridge abutment?

A. The silk mill was past our garage. We could look out of our garage.

Q. You lived in that house for many years?

A. Yes, sir.

Q. Do you know the neighborhood generally?

A. Yes, sir.

Q. I show you a picture here, an enlargement of an aeroplane photograph, and ask you whether you recognize that neighborhood?

A. I do.

Q. Is that a true representation of the North Main Street section before the building of the bridge?

A. It was.

Mr. Meyner: May I offer this in evidence, your Honor?

The Court: Yes.

(Photograph referred to and offered in evidence was marked Exhibit P-4.)

Mr. Stout: I should say it should not be marked in evidence.

The Court: She says it correctly depicts the condition before the bridge approach was constructed.

Mr. Stout: That is, it shows it generally, alluding to the picture as it was taken, you could not show the size of each one of those buildings.

The Court: I think the jury will understand that.

Mr. Stout: The jury can have the use of it, but I am raising the question as to whether it should go in as evidence or by way of illustration.

The Court: If it goes in at all it will have to go in as some type of evidence. I will let it go.

[fol. 64] Mr. Stout: I ask an exception.

The Court: You may have an exception. There are some red ink notations on that picture.

Mr. Stout: Yes.

The Court: You know about those?

Mr. Stout: Yes.

Q. Did you enjoy free circulation of air at that time?

Mr. Stout: If it pleases the Court—

The Court: Objection sustained.

Q. Will you tell us the sort of ventilation you had before the building of the bridge abutment?

A. We had air from the river; we had quite good ventilation.

Mr. Stout: May it please the Court, I thought this was ventilation in the house.

Mr. Meyner: We do not have air conditioning.

(After discussion.)

The Court: Perhaps she could tell us which is the prevailing wind in that location. Maybe that will help.

The Witness: Well, we have very little wind now through there.

The Court: On the average, madam, from which direction do the prevailing winds come?

The Witness: From the Delaware River, that way, to make good sleeping conditions at night—

The Court: Well, the wind comes from the Delaware River, on the average?

The Witness: Yes, sir. It was a nice circulation of air.

[fol. 65] Q. What streets were there which were near your property prior to the building of the bridge?

A. First Street and Second Street. First Street, you go across the river.

Mr. Stout: May it please the Court, does it make any difference what streets were near to this property? It is the street that the property owner had access to or the right of access to that is important on the question of damages.

The Court: I think you are right, Senator Stout. Mr. Meyner, you better limit your question to what streets they used or could have used, to and from their place.

Q. Will you tell us what streets you used or could have used prior to the building of the bridge abutment?

A. First Street we could use to go across the river. Now we have to go down to Union Square to get across the river.

Or Second Street we could go across.

Q. Were there any other streets—

Mr. Stout: May it please the Court, I understand the testimony to be that the witness would go down Main Street and then cross over and go back some other street, and it does seem to me that any other resident of Phillipsburg, or in fact in Easton, that wanted to go over a certain place, they would get as much damage as it would be to this person. I think the question must be the streets they had access to. If they were closed and some wrong arose there may be damages. But if it was closed and there was some other street which they could get to and from their property it is fundamental [fol. 66] that you cannot be damaged by closing some other street in the municipality that you do not have direct access to.

The Court: I suppose, perhaps, you had better be more particular in your question and ascertain to what point they want to go and then what street they use.

(After discussion.)

The Court: Go ahead.

Q. I show you a map. Have you ever seen this map before?

A. Yes, I have.

Q. Will you point out your house on that map?

A. (Witness indicates.)

Mr. Stout: Is the witness going to testify from a map that is not in evidence?

The Court: No, she is not. She is just pointing out her house to counsel.

Mr. Stout: Of what effect is it to have it if we cannot have the paper to look at?

The Court: None, so far.

Q. Does this show generally the streets in the neighborhood before the building of the bridge?

A. It does, the alleys and all.

Q. Does it show the nature of the structures?

A. Yes, sir.

Q. Does it show the mill you spoke of as being in back of your place?

A. It does.

Q. How high was that building?

A. Well, I just don't know; I just could not tell. It was a one story building back behind us.

Q. Was it higher at some points than others?

A. In the middle. There was a skylight in the middle and on Second Street there was a higher building.

[fol. 67] Mr. Meyner: I offer the map in evidence.

The Court: Show it to counsel.

Mr. Stout: The map apparently cannot go in evidence.

The Court: If you object to it I will sustain the objection. If you want to use it you will have to identify it.

Mr. Stout: You will have the draftsman of the map.

Mr. Meyner: This lady has identified her place and the streets in the neighborhood.

The Court: Go ahead.

Q. Will you tell us the streets you were able to use before the building of the bridge abutment?

A. (Indicating on map.) I would say the streets on the map.

Mr. Stout: Maybe if Mr. Meyner will show us the map we can agree to it.

(Counsel examine map.)

The Court: If counsel for the respondent have no objection the map may be marked.

(Map referred to and offered in evidence is marked Exhibit P-5.)

Q. When was this bridge abutment built, approximately?

A. 1937.

The Court: Do you know what month?

The Witness: Well, they were all summer building it. I do not know just exactly.

Q. Does this picture (indicating)—what does that picture show?

A. The bank.

[fol. 68] Q. When?

A. Before.

Mr. Pursel: May I see it?

Q. Does this show the bank during construction?

A. Yes.

Q. Does this illustrate the bank during the construction?

A. Yes.

Mr. Meyner: I offer these two pictures in evidence.

Mr. Pursel: I object to this picture (indicating). It is taken from the hill near Morris Street, above the property. It is mostly trees. It does not show the relator's house, and it shows just a part of the embankment. It is not at all adequate nor true of the scene.

The Court: I suppose we are primarily concerned with the condition before and the condition after, and not the condition during the course of construction. I will sustain the objection to the picture.

Mr. Pursel: And these two other pictures are also during the course of construction.

The Court: Yes. I will sustain the objection to them.

Q. I show you a picture of an embankment and some houses. Do you recognize that?

A. Yes, I do.

Q. Is your house among those between the hill and the embankment?

A. Yes, sir.

Q. I show you another picture and ask you whether you recognize it?

A. Yes, sir.

Q. Does it show your house?

A. Yes, sir.

Q. Between the hill and the embankment?

A. Yes, sir.

[fol. 69] **Mr. Pursel:** Your Honor, it has been suggested that this does not show a true view of the property that Mrs. Colburn occupies and is taken from high in the air. It gives a general impression very different to any from the last, or at least those three.

Mr. Meyner: I have not yet offered them.

Q. (Showing witness photograph.) Do you recognize that picture?

A. Well, I think I could but I don't know.

Q. Would you recognize these two (indicating)?

A. Yes, sir.

Mr. Meyner: May I offer those in evidence?

The Court: Have you any objection to those?

Mr. Pursel: It is hard for me to understand how she can see those and she cannot see the other one. They are taken from the air.

The Court: She recognizes her house. I do not suppose you have any very serious objection to them, have you?

Mr. Stout: I have not seen this (indicating).

The Court: These are apparently air views.

Mr. Stout: I cannot see how a picture taken up in the air—

The Court: I cannot either. Have you ever been up in an aeroplane when it flew over your house?

The Witness: No.

The Court: I do not think you have any serious objection.

Mr. Stout: I do not know what the—They do not mean anything to me.

[fol. 70] The Court: I will admit them, there being no real objection to the admission.

(Photographs referred to and offered in evidence are marked, respectively, Exhibit P-6 and Exhibit P-7.)

Mr. Meyner: There being no objection, I offer this one in evidence as a representation of the bridge and streets after the building of the abutment.

(Map referred to and offered in evidence is marked Exhibit P-8.)

Q. Mrs. Colburn, since the building of this embankment has your view been changed?

A. The view has been changed.

Q. In what way?

A. I cannot see anything but the sky. I cannot see over the bank.

Q. About how high is that embankment in the rear?

A. Well, it is about thirty-five feet.

Q. Has it affected the light you receive from the rear?

A. It has.

Q. What time of the day?

A. In the afternoons and mornings. It affects the light during the daytime.

Q. Are conditions any different in the summer than it used to be?

A. Yes, it is much warmer, and in rainy weather it is very damp; our house is very damp down there in the hollow.

Mr. Stout: I think that is going a little bit out of the scope of the pleadings, about whether it is warmer in the summer than it used to be.

The Court: There is an allegation that they are now in an artificial valley. I will allow it and you may have an exception.

Mr. Stout: All right.

[fol. 71] Q. Will you tell us about the condition in summer?

A. Yes, it is much warmer. We do not get any circulation of air through there, and in damp weather our house is very damp.

Q. Have you noticed anything about the house?

A. It is much damper, and there is mildew in the house.

Q. Where?

A. I got a sweater out of the closet and it was mildewed, and never was before. The other two rooms, we go in there during the summer to keep cool.

Q. Where is your bedroom?

A. Next the back.

Q. You live on the first floor?

A. Yes.

Q. What change have you found during the night?

A. The light. You can't put your shades up to get air.

Mr. Pursel: I object to any testimony about the night light. There is nothing in the pleadings that complains about the condition at night.

The Court: Well, indirectly, she said they cannot raise the shade because of the light and therefore they cannot get any air in the room.

The Witness: That is correct.

Mr. Pursel: I thought she said the light was annoying, as such.

The Court: That is not part of the complaint.

The Witness: No. I cannot get the air.

The Court: I will allow her to testify as she has.

Mr. Pursel: I pray an exception.

The Court: If the light causes them to keep the shades drawn therefore they do not get air. You may have an exception.

[fol. 72] Q. What streets which you used were eliminated by this abutment?

A. Mostly First Street and Second Street. It was mostly First Street to the river.

Q. Did you use any of these other smaller streets?

A. Not so awful much.

Q. In the rear of the second floor is there a bedroom?

A. Yes, sir.

Q. Have you noticed any difference in it since the building of the abutment?

A. Well, I haven't slept up there. We have only rented that part of the building.

Q. Have you been up there to see the view?

A. Oh, there isn't any view up there. We cannot see anything but the sky, the same as downstairs.

Mr. Meyner: Cross examine.

Cross-examination.

By Mr. Purse:

Q. Mrs. Colburn, last year was a pretty damp, rainy summer, was it not?

A. Yes, sir.

Q. Unusually so?

A. Well, I couldn't say about that.

Q. I direct your attention to the map showing the condition of the premises before the bridge was built, and I point out your house, No. 99 North Main Street. Now, as I understand it, you bought the property in 1919?

A. Yes, sir.

Q. Will you describe what buildings were standing on the lot to the rear of your property at the time you bought it?

A. A silk mill—

Q. First, a silk mill?

A. Yes.

Q. And that was directly in back of your property?

A. No; it was not directly in back.

Q. I do not mean on a line. I mean that when you looked out your back window there was the silk mill building in your line of vision?

A. There was only one story.

[fol. 73] Q. Yes, but there it was when you looked out the back window?

A. It was not right in back of the window. It was kind of sideways, we could see past that.

Q. When you looked out of your back window did you not look directly at the silk mill building?

A. That large part was way down in the lot there.

Q. Was there a fence which was in the back of the property, a board fence?

A. Yes, sir.

Q. About how high was that?

A. I should say about nine feet.

Q. And that was solid?

A. Yes, sir.

Q. No paling, you could not see through it?

A. A. No.

Q. And further up on the property, nearer Second Street, I ask you if there was a barn or shed there?

A. It was there.

Q. Do you know what that was used for when you moved there?

A. I do not know what it was used for.

Q. The barn, did you ever know anybody to keep horses in there?

A. That was way down. That led into First Street.

Q. Was that building standing there when you moved there?

A. Yes, sir.

Q. And is this (indicating) up on Second Street here?

A. Yes, sir.

Q. On the line of the property in addition to that building wasn't there over here near the Shimier line a brick building about a story and a half high?

A. You could not see that out in the yard.

Q. You knew it was there?

A. Yes, sir.

Q. Now, to the north of the silk mill building, and on Second Street, is it not true that there was a higher building there where Mr. Leidy had his warehouse?

A. Yes, that was there, but that was half a block from our place, or more.

[fol. 74] Q. What was it used for at the time you moved there, a planing mill?

A. No.

Q. What was it used for?

A. A silk mill.

Q. The Claire silk mill?

A. Yes, sir.

Q. Now, beyond the Leidy warehouse, towards the track of the Pennsylvania Railroad, there is another factory building, isn't there, where the pocketbook factory recently was?

A. Well, that was out there—

Q. Is that on that lot (indicating)?

A. That is on that lot.

Q. So that at the time you bought there on the Leidy lot there was the following buildings: The silk mill, almost directly in back of your property, a brick garage farther away from your property and near the railroad, a barn and shed on Second Street, the Leidy warehouse on Second Street, and the pocketbook factory to the west of that. Is that correct?

A. That is correct, but—

Q. Now, at the time do you remember that to the south of the Leidy property was the Shimer Meat Packing Company?

A. On First Street?

Q. Yes, and is this it (indicating)?

A. Yes, sir.

Q. And was that standing there at the time you bought it?

A. It was.

Q. And that was, what would you say, a two and a half story red brick building?

A. I don't know,

Q. Was it higher than the silk mill, in your opinion?

A. Yes, it was higher than the silk mill.

Q. And in back of that, right on the front of the line, is it not true there was a barn?

A. There was a building there but there was nothing in it.

Q. And then to the west, still on the Shimer property, near the railroad track, there was another shed, right on the Leidy line, is that correct?

A. Near the railroad track?

Q. Yes.

A. Yes.

[fol. 75] Q. Where they had their mill and their railroad siding, do you remember that?

A. I remember that.

Q. So that taking the properties to the rear of your house, they were pretty well built up, weren't they?

A. No; there was lots of air there. It was farther away than First or Second Street.

Q. But on the Leidy property there were five good sized buildings, and on the Shimer property to the south there was one large building and two small ones, is that correct?

A. That is correct.

Q. And there was a high board fence directly back of your property?

A. Well, that didn't amount to anything.

Q. You could not see through that, could you?

A. No. They had a good deal of land there for air.

Q. Now, you are still living there and you were living at the same place at the time the Bridge Commission came in and took possession?

A. Yes, sir.

Q. At that time was the Shimer Meat Company still in operation?

A. Not when they took it, I don't think. You see we do not know anything about the Shimers.

Q. It was closed down, was it not?

A. I think it was.

Q. Were the windows and doors barred up, on First Street?

A. That is more than I could say. I do not know.

Q. Was the silk mill building directly in back of your house being actively used by any company for manufacturing?

A. Not for two years.

Q. It was just standing there idle?

A. It was kept up very well. It was painted and it was a very nice building and it was fireproof.

Q. Mrs. Colburn, you have spoken about various streets [fol. 76] that were abandoned or vacated in the North Main Street area.

A. Yes.

Q. Now, it is true, is it not, that the only one of those streets on which your property directly abutted was North Main Street?

A. Yes.

Mr. Pursel: That is all.

Mr. Meyner: That is all. If your Honor please, I would like to call at this time several witnesses to testify to comparable sales in the neighborhood.

JOHN BAKER, SWORN FOR the relators.

Direct examination.

By Mr. Meyner:

Q. Mr. Baker, in 1937, did you live in the North Main Street section of Phillipsburg?

A. I would call it that, yes.

Q. Where do you live?

A. 64 Rose Street.

Q. Who is the owner of the property?

A. At that time?

Q. Yes,

A. My wife and I.

Q. What sort of a property did you have?

A. What do you mean, as to size?

Q. Yes. What sort of a house?

A. A single frame house.

Mr. Stout: May it please the Court, I do not see the materiality or relevancy of this testimony, the place where he lives and the kind of a house. What has that to do with this case?

The Court: I do not know, yet.

Mr. Meyner: If your Honor please, I intend to show a [fol. 77] sale of comparable property in the neighborhood so that my real estate man will not only be familiar with the values before and after but so that he would be competent to testify in this proceeding. This man has sold a property. It was a transaction between a willing seller and a willing buyer. The place is about two and one-half or three blocks from the property in question. I am trying to bring out that his house was somewhat smaller and was sold at a period of time closely similar.

The Court: To the Bridge Commission?

Mr. Meyner: No, it was not sold to the Bridge Commission.

Mr. Stout: May it please the Court, it is laid down in the law that an expert cannot use the sale of alleged comparable properties in arriving at his opinion of the property under review. The expert must have acquired the knowledge in the course of his business as a realtor or an expert either from the owner or the purchaser or the broker or someone who was familiar with the transaction. And then before the

sale of the property can be used to support the opinion of the so-called expert the property sold must be in effect substantially similar to the property under review, and it must be made at a certain time with respect to the time that you are valuing the present property. I say that the testimony of this witness that he may have owned a piece of property in this neighborhood in proximity to the property here under consideration and that it was even comparable with the property under consideration, would not permit him to testify [fol. 78] in respect to it, because, as laid down in the law, that is the question for the expert, the comparability of property, if he has really compared one piece of property with another piece of property.

The Court: Well, if what you say is all true, this may or may not be of value, so thus far it is all right. I think the owner of property can testify what he sold his property for.

Mr. Stout: What difference would it make, unless it had some bearing on this case?

The Court: It is merely to qualify his experts, I believe.

Mr. Stout: He cannot qualify his experts upon what some other witness testifies to.

The Court: I think he can. I think if an expert gets information from the owner or the buyer or seller that he can base an opinion on that hearsay proof.

Mr. Stout: No. The statute provides that the so-called expert must have obtained his information in the course of his business either from the seller or purchaser or from the broker or someone acting in the sale. He cannot come into Court and say, "I have listened to the testimony of so and so and he said he sold a piece of property similar to this".

(After argument.)

The Court: I will allow these questions as far as they have gone.

Mr. Stout: I ask an exception.

The Court: You may have an exception.

[fol. 79]. Q. What sort of a frame building was it on this property?

A. Two and one-half story frame.

Q. How many rooms downstairs?

A. There were four rooms down, and a hall, and four rooms and bath up, and a hall.

Q. Was the attic finished?

A. No.

- Q. What were the dimensions of the actual property?
 A. The frontage was 88 feet and the depth was 110 feet.
 Q. Were there some garages on the property?
 A. Yes.
 Q. How many?
 A. There were nine all told.

The Court: Nine garages?

The Witness: On the rear.

- Q. When was that property sold?
 A. The transaction was closed in April, 1937.
 Q. Was the house in good condition?
 A. Yes, sir.
 Q. What was the purchase price of the property?

Mr. Stout: Objected to.

The Court: Objection sustained.

Mr. Stout: There is no comparability between that property and this property.

Mr. Meyner: If your Honor please,—

By the Court:

- Q. Where is Rose Street with relation to 99 North Main Street?

A. I would say that my property was approximately—I lived between Third and Fourth on Rose Street. 99 is between First and Second, on Main, and I would say possibly a block and a half.

By Mr. Meyner:

- [fol. 80] Q. Point out on the map where Rose Street is.

A. (Indicating on map:) Here is Rose Street. Here is Third Street.

- Q. What is the street just to the left of where you have your finger, at that angle (indicating)?

A. Howell Avenue.

- Q. Where is the business section of that territory, in what direction?

A. There is no business section in it.

Q. In Phillipsburg?

A. Well—

- Q. Where do you go to the A & P store and James Butler's and the movie?

A. Well, the movie is on the hill, that is quite a distance.

Q. In which direction?

A. You would have to go up here (indicating) through North Main Street, and up through Meadow Avenue.

Q. Where is the bank and post office?

A. At the top of Meadow Avenue is the post office. The closest bank is on Union Square.

Q. That is on the other side of the railroad tracks?

Mr. Pursel: It is at the head of the old bridge, your Honor.

The Court: Now, you want to show the sale of this property in the summer of 1937 because you say that it is comparable to the piece in question?

Mr. Meyner: Yes. I think any differentiation in buildings or in the amount of property could be brought out on cross examination of my experts. I think if you are going to ask for an identical property you will never show sales.

The Court: What is the size of your property?

Mr. Meyner: Twenty-five by 125, I think.

[fol: 81] Q. How old was your house?

A. We purchased it in 1918. I would say at that time it was possibly fifteen years old. That is only an estimate; I do not know for sure.

Q. Then you had nine garages on the lot?

A. That is right.

Q. And I assume you rented them?

A. Yes, sir.

Q. When you sold it you sold the garages with it?

A. Yes, the whole thing.

Q. With the tenants and everybody?

A. Yes, sir.

The Court: I do not think it is comparable, Mr. Meyner.

Mr. Meyner: My experts will be able to show that a garage has a certain value and a house a certain value.

The Court: Sales of comparable properties in the immediate neighborhood are some proof, but they have to be nearer similar than that. There are other elements there. The nine garages may be an item in the sale.

Mr. Meyner: I will ask how much income he had from them.

The Court: No. I do not want to get into a lot of collateral issues. I will sustain the objection. It is quite a distance away and it is nearer the business section or farther away.

Mr. Stout: It is an altogether different neighborhood.

The Court: I will say it is not comparable. You may have an exception.

You may step down, Mr. Baker.

(The witness retired.)

[fol. 82] IRVIN H. REX, sworn for the Relators.

Direct examination.

By Mr. Meyner:

Q: Where do you live, Mr. Rex?

A. 38 Glen Avenue, Phillipsburg, New Jersey.

Q. What is your business?

A. Real estate broker.

Q. Have you sold some properties recently on North Main Street in Phillipsburg?

A. Yes.

Q. At what addresses were those properties?

A. (Witness refers to book.)

By the Court:

Q. Incidentally, how long have you been in the real estate business?

A. About four years.

Q. What did you do before that?

A. Before that I collected rentals.

Q. Do you mean from your own properties?

A. No, for the building and loan No. 5.

Q. And for the last four years you have been actually engaged as a broker in real estate?

A. Yes.

Q. Have you got a little insurance business on the side too?

A. No, sir.

Q. You do not handle insurance?

A. No.

Q. They usually go together.

A. I know.

By Mr. Meyner:

Q. Who was the owner of those properties?

A. Mrs. Rose Bachman.

Q. Was she the purchaser?

A. Yes, sir.

Q. Where is that property?

A. On North Main Street, on the right-hand side going down.

The Court: Well, say, north, east, south or west.

[fol. 83] The Witness: Well, it would be on the north side of the street.

Q. It is really east and west.

A. Well, we will say the west side.

The Court: Is it east or west?

The Witness: West.

Q. What number was that property that Bachman purchased?

A. 153.

Q. Was it part of a row?

A. Part of a row.

Q. Of how many?

A. Three.

Q. How many rooms down?

A. Three rooms down.

Q. How many up?

A. Three rooms and a bath and a hall; and a hall downstairs, also.

Q. Was it equipped with improvements?

A. All improvements, gas and electric.

Q. About what sort of frontage did it have?

A. It had a bay window and about 16 or 18 feet front.

Q. About what depth?

A. About 125, I would say.

Q. Where is that property with relation to this map?

Have you seen this map at all? There (indicating) is First Street and Second Street, and there is Hess Avenue.

A. Yes.

Q. Was it this property right here (indicating)?

A. Yes, sir.

Q. (Indicating:) This is 151, and this is 155.

A. Then that (indicating) is it.

Q. That would roughly describe the tract?

A. Yes, sir.

Q. When was that sold?

A. Just about a month ago.

Q. Did you handle the sale?

A. Yes, sir.

Q. You saw the purchase price change hands? I mean, [fol. 84] you knew the price at which it was bought?

A. Yes.

Q. What was the purchase price?

Mr. Stout: I object. First, I do not see that there is any substantial similarity between that property and the Colburn property here under consideration. Here is a piece of property that stands on a plot of ground 16 or 18 feet frontage. The Colburn property, as I understand it, had 25 feet frontage. The Colburn property has five rooms on the first floor, I think, and this property has three rooms on the first floor. And so on. It may be difficult to show comparable property, in the law, but it has got to be, to be any evidence of the value of a piece of property that you are comparing it with. Generally you have a situation of this kind when you have two properties on the same street in proximity to each other which have the same design and same construction. You cannot compare a brick house of the same size with one of frame. In other words, it is not a question where you have eliminated the good features and you have eliminated the bad features and figured those out and get down to a building of the same type. It has got to be, as I say, so similar that one property is some evidence of the value of another piece of property.

The Court: We are a little closer now.

Mr. Stout: We are closer, but look at the property you have. You are not directly in the zone affected by this im- [fol. 85] provement. In other words, this property is where the embankment is much less than down at the Colburn property. A man cannot make any comparison.

The Court: I understand your purpose now is to convince me that this man should be admitted as an expert.

Mr. Meyner: Yes. I will withdraw the question.

The Court: And your purpose is to show that he is familiar with recent sales.

Mr. Meyner: I am using him to tell merely about sales.

The Court: You are not qualifying him as an expert?

Mr. Meyner: No.

The Court: You better go ahead with your examination.

Mr. Stout: May I have an exception?

The Court: He is going to put in some preliminary proof now.

Q. Have you examined the Colburn property?

A. Yes, sir.

Q. What sort of a structure is that?

A. A frame structure.

Q. About how many stories?

A. Two and a half stories.

Q. In what way is it similar to this property?

Mr. Stout: May it please the Court, that is not a proper question.

The Court: Objection sustained. You better describe the other property and see—the Colburn property.

Q. Will you describe the Colburn property?

A. It is a two-family house, two families live in it; four [fol. 86] rooms up and down and bath and improvements, gas and electric, about 125 feet deep and 25 feet front, approximately, side entrance.

Q. There is a double party wall?

A. Yes, sir.

Q. Now will you describe the Bachman property?

A. That is a single house but very close to a double house, we will say three in a row, built alike, all improvements, three large rooms, bath and hall up and down stairs, gas, electric and heat. The depth is approximately 120 feet to an alley and about 16 or 18 feet front.

Q. What did Mrs. Bachman pay for that property?

Mr. Stout: I object. I think the testimony clearly demonstrates that the selling price of the Bachman property reflects no value as far as the Colburn property is concerned. The Bachman house is—Is that one of three attached or detached houses?

The Witness: Detached.

Mr. Stout: The Colburn property is an attached house and has a party wall. And the size of the lot—Can you make any comparison? Who is going to figure out whether a lot 16 feet on this street would be any evidence, with that structure upon it, as to a lot 25 feet with a different structure upon it?

By the Court:

Q. Do you know how old the Bachman house is?

A. About thirty-five or forty years old.

Q. What about the Colburn house?

A. I would say maybe twenty-five.

Q. And they are within how many feet of each other?

A. Three hundred feet, approximately.

[fol. 87] Mr. Meyner: If your Honor please, the objection, seems to me, would go to the weight of the testimony.

The Court: I think I will let him use it.

Mr. Stout: I have had a lot of experience in the matter of determining the value of property in tax litigation where the question comes up—hundreds and hundreds of them—and if I thought this question was going to come up in this way I would have had the cases here. I say there has got to be that similarity between the two properties that the jury can say that the one property is so near like the other property that the sale of one piece of property would be evidence of the value of the other property. But if the Court wants to let it in I will ask an exception.

The Court: I will permit him to testify to the purchase price of this other piece. You may have an exception.

By Mr. Meyner:

Q. How much was it sold for?

A. \$1700.

Q. When was it sold?

A. Just about a month ago.

Q. And the embankment was in back of that?

A. Yes.

Q. Did you sell any other property in that neighborhood?

A. Yes, sir.

Q. What property was it?

A. 179 North Main Street.

Q. Would that be between Hess Avenue and Third Street?

A. Yes, sir.

Q. (Indicating on map.) Right about in here somewhere?

A. Yes.

[fol. 88] Q. What sort of a house was it?

A. A single frame house, 25 feet front, 120 feet deep, garage and all improvements, gas, electric and heat; a two and one-half story.

Q. What is the condition of the bank at the rear of that property?

A. There is some embankment there, but it is much lower.

Q. Was that house in good condition?

A. Pretty good condition.

Q. How much did that sell for?

A. \$2900.

Mr. Stout: I object. There has not been any similarity between the properties shown, to justify him to ascertain the value.

By the Court:

Q: How many rooms did that have?

A. Seven rooms and bath; two rooms and hall up and down; two and a half story.

Q. How old was that building?

A. About thirty-five years old.

Q. On the same side of North Main Street as these other places?

A. Yes, sir.

The Court: I will permit him to testify, Senator. You may have an exception.

By Mr. Meyner:

Q. What did you say it was sold for?

A. Twenty-nine hundred.

The Court: Did you actually take care of that sale too?

The Witness: Yes, sir.

Q. When was that sold?

A. Well, it was sold, I think, about six months ago.

[fol. 89] Q. Do you have a notation of it?

A. No, just that it was sold six months ago.

Mr. Meyner: Cross examine.

Cross-examination.

By Mr. Stout:

Q. How long did you have this latter property that you speak of, for sale, before you consummated the sale?

A. Two years, approximately.

Q. What were the circumstances under which the property was sold? Was it a cash transaction?

A. Yes.

Q. Was there any mortgage on that property?

A. No.

Q. There was not a mortgage on the property previous to the sale?

A. No.

Q. What were you trying to get for the property?

A. \$4,000.

Q. You were trying to get \$4,000?

A. Yes, sir.

Q. And you got \$1700?

A. Twenty-nine hundred.

Q. This property, is that affected in any way by the embankment?

A. Yes.

Q. Will you point out on the diagram or map there just where this property is located?

A. (Indicating on map:) Right there, about midway between Hess Avenue and Third Street.

Mr. Pursel: Take the lower map.

The Witness (indicating): I would say it was about midway there.

Q. What is the access, if any, to this property from the rear?

A. An alley.

Q. Was that alley closed by the development of the bridge?

A. Yes, sir.

[fol. 90] Q. And with respect to this property, what is the height of the embankment back of the property?

A. Approximately 15 feet.

Q. Fifteen feet?

A. Approximately.

Q. What is the size of the lot do you say?

A. Around twenty or twenty-five feet. There is a side entrance and a woodhouse.

Q. You do not know, then, whether it is 20 or 25?

A. Not exactly, no.

Mr. Stout: May it please the Court, particularly with respect to the property, how are you going to make a comparison when you do not know the dimensions of the land actually sold?

The Court: I do not think we are up to that yet. It is merely for the purpose of qualifying someone else to speak on the value.

Mr. Stout: That is all. I will ask an exception.

The Court: Do you not think that for the record we should note on the map there the location of this other piece of property more definitely?

Mr. Meyner: Yes.

By the Court:

Q. What was the name of the property you sold six months ago for \$2900?

A. It was the former Parks home.

Q. Was it Emma Parks?

A. Yes, sir.

Q. Is that the location where Mr. Meyner is writing on the map?

A. Yes, sir. 179.

By Mr. Meyner:

Q. What was the number of the other one?

A. 153.

[fol. 91] Q. And what name did you give for that?

A. Rose Bachman.

Q. And this one went for twenty-nine hundred and this for seventeen hundred?

A. Yes, sir.

By Mr. Stout:

Q. Who was the seller of this last piece of property?

A. Myself.

Q. You were the broker, but who was the seller, the vendor, the one that sold the property?

A. This last property, do you mean?

Q. Yes.

A. Mrs. Parks.

Q. Wasn't she the executrix of an estate that sold it?

A. No. The woman is still living.

Q. Yes, but was she representing an estate?

A. No.

Q. Are you sure of that?

A. Her daughter was doing business for her, but the actual owner was still living, Mrs. Parks.

Q. The information I had was that the property was sold by an estate.

Mr. Meyner: Do you know of any compulsion for this sale?

Mr. Stout: I object.

The Court: Objection sustained.

By Mr. Meyner:

Q. Did you negotiate this sale?

A. Yes, sir.

Q. Was the seller eager to sell?

A. Yes.

Mr. Meyner: That is all.

[fol. 92]. CARL COLBURN SWORN FOR THE RELATORS.

Direct examination.

By Mr. Meyner:

Q. Mr. Colburn, where do you live?

A. 99 North Main Street.

Q. Whereabouts?

A. I live on the second floor of that property.

Q. How long have you lived at 99 North Main Street?

A. Ever since my parents acquired the home. That is nineteen years ago.

Q. How long have you lived in the apartment upstairs?

A. Just about nine years.

Q. Were you familiar with the conditions in that neighborhood before the building of the bridge abutment?

A. I was.

Q. Before the building of the abutment were you set off at all?

Mr. Stout: May it please the Court, the question is, What was the surroundings?

Q. What were the surroundings?

A. Before the abutment was built it was more or less all one community. That included the rest of that section.

Q. Will you describe what the neighborhood surrounding was like, from the map over there?

A. Well, the street that we live on here interconnected with all the other streets in this section.

Q. What street, for instance?

A. Well, North Main Street was connected with Broad Street, with Second Street; and then Howell Avenue connected with Main Street, and all those streets were connected and made one community.

Q. Were there other residences up here?

A. Yes, all this section.

Q. How did you find your home during the summer?

[fol. 93] A. In the summer it was quite warm, due to no air circulation at all—.

Mr. Stout: May it please the Court, what has that got to do with this case?

The Court: Well, it is a little general.

Mr. Meyner: I will be more specific.

Q. Before the building of the abutment where were the prevailing winds from?

A. Well, it seems to me in the summer time most of the breeze comes from the west. As a rule most of the storms come out of the west, but we had good air from the other side of where the bridge is built now.

Q. In which direction?

A. In the direction of the river and Pennsylvania.

Q. Did you have a bedroom on the second floor?

A. In the rear of the second floor.

Q. What sort of view, before the building of the abutment, did you get from the rear?

A. You could see the Pennsylvania shore, all of College Hill, and from there on up the river.

Q. Did this building (indicating) interfere very much with your view?

A. Not as compared to what it is now. That building was only about 20 feet high, that is the main building, and now you have a 35 foot bank there.

Q. Was this building higher than the other (indicating)?

A. With the skylight in the center it was about 10 feet, I should judge.

Q. That is about 28 feet?

A. Yes, sir.

Q. But the main part of the building was just one story?

A. Yes, sir.

Q. You could see over that?

A. Yes, sir.

Q. Could you see around it at angles?

A. You could see this end of this building and part of the Shimer property.

[fol. 94] Q. Did this affect your light very much (indicating)?

A. Little bit—

Mr. Stout: May it please the Court, is it what was there or—

The Court: Objection sustained.

Q. When was the abutment built?

A. I think it was started in 1936.

Q. Looking at these two maps, will you tell us what streets were abandoned?

A. First Street was abandoned entirely, and—

Q. Did you have occasion to use First Street?

A. I did, yes.

Q. Where did First Street lead to?

A. Across the tracks to the river. And then there was a road that led from the river to the Union Square, and that in turn takes you to the bathing beach, and they have to go there to go fishing.

Q. How do you get over there now?

A. You have got to go down North Main Street to the Square and up along the river.

Q. What other streets were abandoned?

A. Part of Broad Street, the lower end of Broad Street.

Q. Was Second Street affected?

A. Just part of it. That went all the way over to the railroad and cut the property in half, and then there was Skillman Alley—

Q. That being this alley (indicating)?

A. Yes, sir.

Q. How about this street?

A. Part of Howell Avenue, yes, sir.

Q. Is Howell Avenue there?

A. Part of Howell Avenue runs there.

Q. Did you have occasion to use some of those streets?

A. Yes, sir.

Q. In what way?

A. Well, to go to the store.

[fol. 95] Q. What are the conditions generally now? Describe the neighborhood you are in now?

A. Well, in that section the neighborhood is more or less by itself. It seems that since it has been built there we get

a whole lot more noise due to trucks going down the bridge, backfiring, and Routes 22 and 28 are on North Main Street, which was not there before, and in damp weather the gas from the trucks coming through, coming from the bridge, seems to lay in this valley and there is no air to take it out of there, and we have the fumes all the time, especially in damp weather.

Q. Will you describe the conditions in your bedroom now?

A. Well, there is the walk of the bridge above the bedroom window and therefore you stop the circulation; and, of course, you have to keep the light out if you want to sleep.

Q. How about the winds now?

A. I do not know of any.

Q. Would this picture here (indicating) represent the conditions existing now?

A. That is Broad Street and that is close to the bridge.

Q. You recognize that?

A. I do.

Q. Does that represent the conditions existing there?

A. That is the bridge.

Q. Is your property included amongst those houses?

A. Yes, sir.

Q. I show you a third picture and ask you whether that shows conditions existing there?

A. It does.

Q. Does this (indicating) show your property, the rear of the property in which you live, with the neighboring section?

A. It does. The property is right in here (indicating).

Mr. Meyner: I will offer those photographs.

[fol. 96] Mr. Pursel: I have no objection to that one (indicating) if it is not already in. But these two (indicating) are the same as the ones that are already in, duplicates.

The Court: Is that so?

Mr. Meyner: They may be a little different.

(Photograph referred to is marked Exhibit P-9.)

The Court: Yes. These are the same, the same as that marked P-6 and this one is the same as P-7.

Mr. Pursel: And this one I object to on the ground that it is taken from the air at an angle from the west. It is a view toward the Relator's property.

Mr. Meyner: It shows the height of the abutment.

Mr. Pursel. There is plenty in to show the height, your Honor.

The Court: I will sustain the objection to that one.

Q. What sort of a view do you get from your rear bedroom on the second floor now?

Mr. Stout: Objected to.

The Court: Objection sustained.

Q. Will you describe what you can see looking out of the bedroom window on the second floor?

A. Practically nothing but the bank, the abutment that has been put in the back there.

Mr. Meyner: Cross examine.

Mr. Stout: May it please the Court, I move to strike out [fol. 97] the witness' testimony with respect to the gas fumes and the noise of the trucks. We do not think that they are in issue here. It is on the light, the air and the view.

Mr. Meyner: If your Honor please, I have alleged diminution of light, air and view, and if there was gas in the valley I think there would be diminution of air. Secondly, I have alleged generally that the property has been depreciated by reason of the building of the bridge abutment. These are conditions arising out of the building of the bridge abutment. These all go as factors as to whether or not they are damaged.

The Court: I will allow it to stand, Senator Stout.

Mr. Stout: Under the statute it is only with respect to damages, if any, caused by the curtailment of light, air and view.

The Court: Property taken, injured or destroyed. I will allow it to stand for what it is worth. You may have an exception to the ruling.

Mr. Stout: Very well.

Cross-examination.

By Mr. Stout:

Q. Mr. Colburn, where does the sunrise and set with respect to the Colburn property? Can you indicate it?

A. The sun rises more or less, I would say, up the street from the house; and, of course, it sets in the rear of it.

The Court: Show the Senator on that map there.

The Witness (indicating on map) : It rises here and sets off in this direction.

[fol. 98] The Court : That does not mean much on this record.

The Witness : East is in this section here (indicating) and this is west. The property is here and the sun would set in the rear of the property.

Q. Then the approach to the bridge does not intervene between the sun and the rear of your property?

A. Well, some, yes.

Q. How could it if it sets where you say it would, just over in this section of the Delaware, over here?

A. (Indicating :) Here is where the sun sets, in this direction, and here is the fill, and this is directly west.

Q. Yes, but does the sun get over the fill or the embankment of the bridge, does the sun get over on the other side of it?

A. The sun goes down below the embankment. If the embankment was higher than the horizon was originally why wouldn't the sun disappear quicker?

Q. I am asking you whether the sun sets on the other side of this embankment?

Mr. Meyner : If your Honor please, there are directional marks on that map, and the Court can take judicial notice of where the sun sets.

The Court : I will allow it.

Q. Is that your best answer?

A. Well, that is the best answer, the way I can show it on there.

Q. This Colburn property is not shaded by the embankment being there between the sun and the property, is it?

A. Well I wouldn't say exactly. I am not home much in the daytime.

[fol. 99] The Court : How about Sundays?

The Witness : Sometimes. I work Sundays as a rule.

Q. Now, these streets back here (indicating) that were closed up, North Main Street, that ran along to the rear of your property, or the Colburn property, did it not?

A. North Main Street is in the front of the property.

Q. What street is this back here that was vacated?

A. No street. There was First Street and Second Street, where this goes now (indicating).

Q. In other words, what you are complaining about is First Street, here, and Second Street, here (indicating), is that right?

A. Yes, sir.

Q. So that the Colburn property did not abut on First Street nor on Second Street, did it?

A. No, it did not.

Q. The only access that you had to the Colburn property was from North Main Street, isn't that so?

A. That is right.

Q. As far as First Street being vacated, this property on North Main Street, the Colburn property, suffered no more than some of that property up on Main Street, is that so?

A. I would say yes.

Q. Do you mean because you are nearer the—

A. Since that has been taken away it would, at least to us. Now you have to go to Third Street and come down or a block below First Street and come up to it before you can get around to Second Street, which is only half a block away.

Q. Do not people on North Main Street to the east of your property have to do the same thing if they want to get into the locality of that section?

A. Yes, sir.

Q. You or the owners of the Colburn property had no [fol. 100] more right to the use of First Street or Second Street than other people living in this locality?

Mr. Meyner: I object to the question, "Other people had no more right—"

The Court: I will allow it.

Q. You hadn't any special right there?

A. Not in the street, no; of course not.

Q. So that the vacating of those two streets affected the Colburn property the same as other people that did not abut on that street had the right to use it, isn't that so?

A. That is right.

Q. Before these buildings to the rear of the Colburn property were demolished you could not see the Delaware River, could you, from the rear of that property?

A. I could not see the river at low water, but I could see the river.

Q. You could see it between the buildings?

A. Yes, sir.

Q. And the rear of the Colburn property had a lower level than on North Main Street, isn't that so? Does not the property slope back?

A. It might be a foot difference.

Q. Then in front of the Colburn property, to the rear was there a board fence nine or ten feet high?

A. Not in back of us. There was our garage and a wire fence, and it is still there.

Q. Is there not a garage directly back—

A. A garage and wire fence.

Q. How high is that garage?

A. It might be 7 feet to the peak.

Q. Then to see the Pennsylvania bank of the Delaware River you would have to look over that—

A. Yes, but I live upstairs. I could do that.

Q. Oh, I see. Upstairs it was not within your line, but did [fol. 101] any of those buildings extend to the height of the second story of the Colburn property?

A. Only the large building near the railroad on Second Street.

The Court: Identify it, please.

The Witness: It belonged to the A. W. Leidy Company.

Mr. Stout: That is all.

Redirect examination.

By Mr. Meyner:

Q. When you say that by reason of the abandonment of the street that you suffer no other injury than others suffer, do you mean these people along in here (indicating)?

A. No, anyone in that particular block.

Q. Meaning between First and Second Street?

A. Between First and Second Street.

CARL BEIER, sworn for the relators.

Direct examination.

By Mr. Meyner:

Q. Mr. Beier, where do you live?

A. 107 North Main Street.

Q. How many doors from the Colburns?

A. Three.

Q. Will you tell us what properties were behind the Colburn property before the building of the bridge abutment?

A. The Leidy properties.

Q. Have you ever had occasion to view the rear from the Colburn property?

A. Well, I have, yes.

Q. How tall is that Leidy building, the largest of the group, in back?

A. Right directly in back of the Colburn place, I would judge about 18 or 20 feet.

[fol. 102] Q. Did it become higher at another point?

A. No, not in back of the Colburn property.

Q. From the Colburn property, the second story, what could you see?

A. I have never been upstairs. From downstairs all you could see was the Leidy building.

Q. Was there space between those buildings in the back?

A. Do you mean from the Colburn house to the Leidy buildings?

Q. Yes, and between the various buildings in the back?

A. Yes; there was space.

Mr. Stout: May it please the Court, that is a very leading question.

The Court: We have it pretty well on the map here, anyway, I think.

Q. Where would you get your prevailing winds?

A. The prevailing winds we would get out of the west and the south and the north.

The Court: Do you ever get a northeast storm up here?

The Witness: Yes, sir.

Q. What streets are connected with North Main Street?

A. First Street, Second Street.

Q. Do you occasionally use some of those streets in there?

A. Yes, sir.

Q. Will you look at that map and show us what streets were used: this (indicating), being the Colburn property, this being First Street and this being Second Street? Will you describe to us the streets as they were before the embankment was built?

A. First Street from North Main Street across the railroad tracks over to a road coming from South Main Street up into the horseshoe works. And Second Street, from [fol. 103] North Main Street past Broad Street and past the Leidy properties to the railroad tracks and the horseshoe works.

Q. What other street?

A. We used to have Skillman Alley connecting Howell Avenue with Broad Street.

Q. Is Broad Street there now?

A. No. Broad Street has been relocated.

Q. What other streets were there—Has that been changed?

A. Why, yes; part of it, yes.

Q. About how long is that abutment, or where does it extend from and to where?

A. It starts from a little way beyond First Street and runs all the way to Third Street, a little way this side of Third Street.

Q. Does it have any interruptions?

A. No, sir.

Q. How high is it, approximately, behind the Colburn property?

The Court: I think we are agreed that it is 35 feet, are we not?

Mr. Stant: Yes.

Q. Is the view the same from the Colburn property now?

A. No, it is not.

Q. What can you see from there?

A. From the bottom floor you cannot see anything but the embankment. I do not know what you can see from upstairs because I have never been up there.

The Court: Before the embankment was there you said the only thing you could see was the Leidy building.

The Witness: Yes, sir.

The Court: And now you see dirt instead of a building?

The Witness: A big embankment, yes.

[fol. 104] Q. Your house is similarly situated, is it?

A. Yes, sir.

Q. Can you see anything from the second floor?

A. Only the embankment.

Q. Do you get very many winds now?

Mr. Stout: Are you speaking about this witness' property now?

The Court: He lives next door, practically.

Mr. Meyner: It is similar property.

Mr. Stout: It is not what similar property gets. It is what this particular property gets.

The Court: I will allow him to testify about it.

Q. What prevailing winds do you get now?

A. Mostly from the south and northeast and north.

Q. What effect does the embankment have?

A. The abutment stops it from coming from the west.

Q. Will you describe the conditions now?

A. Well, it is more or less damp in the valley there. It is an artificial valley and we haven't got the air circulation that we had before, and on damp and rainy days the dampness hangs in there.

Q. Didn't the buildings hold some in there?

A. Some, yes, but not near as much as it does now.

Q. What difference is there in the neighborhood now?

A. Well, we own a property there and rent one-half of it, double.

Mr. Stout: Objected to.

The Court: Objection sustained.

Q. Are you still part of the North Main Street section?

A. Yes, sir.

Q. Can you go other places in the neighborhood as easily as before?

A. No.

[fol. 105] Mr. Stout: I object to that question.

The Court: I will allow that. Part of these streets have been closed.

Mr. Stout: Yes, but the public has the exclusive rights in their streets and when it vacates them what does that have to do with the respondent here, the Bridge Commission?

The Court: I think it goes to whether or not they had the same access to and from their properties as before.

Mr. Stout: That means legal access.

(After discussion.)

The Court: I think it would have to be special injury or damage to this particular piece of property, more than as to

the public, and that is the theory upon which I am letting it in.

(Last question read.)

The Witness: No, sir.

Q. Why?

A. We have to go out of our way.

Q. Will you look at the map and show us why that is so.

A. Yes. (Referring to map.) Now, if I want to get to the river I have to go all the way in to Union Square and go around the Square and come up to the road leading from Union Square back to the bathing beach; to the horseshoe works.

Q. Will you show us that on the other map?

A. Yes. (Indicating.) That is First Street, from North Main Street to the river, and all the way to Union Square, through Union Square and come up here from Union Square to the horseshoe works.

Q. That is one street. Tell us about some others.

A. Second Street. If you want to go to Broad Street you have to go all the way down past First Street, cross over [fol. 106] into Broad Street. That is, going down to the river. Going up the river, you have to go all the way into Third Street and then cross over into Broad Street.

Mr. Stout: May it please the Court I object to this testimony and move it be stricken out because the Colburn property was not affected any more by the closing of the streets in that neighborhood. They could use First Street or Second Street.

The Court: I am going to let the jury say that. I will let them say whether or not there has been any curtailment of the access to and from this property.

Mr. Stout: Over any street?

The Court: No. The streets that were closed.

(After discussion.)

The Court: That is one of the issues that I think we ought to report on. Your proof may be entirely to the contrary, and probably will be, and so far I will allow it.

Mr. Stout: May I have an exception?

The Court: Certainly.

By the Court:

Q. Now you have to go a couple of blocks out of your way?

A. Yes, sir.

Q. Did they build nice roads?

A. Well, yes.

Q. Better than First Street used to be?

A. Yes.

Mr. Stout: I have no cross examination.

The Court: We will adjourn at this time until ten o'clock tomorrow morning.

(Adjourned until Tuesday, October 11, 1938, at ten o'clock in the forenoon.)

[fol. 107]

Belvidere, N. J., October 11, 1938.

(Case resumed pursuant to adjournment.)

(Appearances as before noted.)

Mr. Stout: May it please the Court, I desire to move to strike out the testimony of the two witnesses who attempted to testify as to the selling prices of two respective pieces of property, on the ground that in order that sales of a piece of property, having been established as comparable, is admissible in evidence to show the value of the piece of property under review, it must be evident to the Court that there was a bona fide sale by private contract by a party willing to sell and not required to sell and a party willing to buy and not required to buy.

The testimony that we had yesterday from both of these witnesses is the rankest kind of hearsay testimony. Any witness could go on the stand and say, "I sold a piece of property for a certain sum of money." There is no way of checking up on it.

It is laid down in the law that if a party attempts to prove a sale he must show that sale meets the statutory requirements. The sale must be a contract in writing. The last witness who testified to the sale yesterday said it was a sale or attempted sale of a building and loan to the former owner of the property. There is a recital in the deed, "Being the same lands and premises conveyed to the said building and loan association of Phillipsburg by Rose Bachman." Rose [fol. 108] Bachman is the grantee. Here is a piece of property that had been conveyed by Rose Bachman to the build-

ing and loan association and the building and loan association in turn conveyed it back to her. That is no sale within the statute.

So I say that any sale without showing that the property involved in the sale is comparable to the property under review—That is the first thing that must be shown. Secondly, you must show a bona-fide contract, and the only way to show a bona-fide contract is by a contract duly executed in writing. Furthermore, someone familiar with the transaction must testify that it was not a forced sale, that the sale met the statutory requirements. Therefore I say that the testimony of these two witnesses, as to the selling price of property, is of no evidential value and therefore it ought to be stricken from the record.

The Court: As I understand it, Senator Stout, the only purpose of this proof at all is to attempt to qualify other witnesses that he will produce as experts to testify as to what he claims is a diminution in the value of his, Colburn's, property. I do not think the jury understands that because one man sold his place for \$1,700 and the other person sold it for \$2,000, that that was the value of the Colburn property. Now, really, under the rule, I do not know how he is going to qualify his experts otherwise.

Mr. Stout: I do not either. I think there is a way of qualifying, if you have a real estate man familiar with the neighborhood who has either made sales himself of property in the locality, or has direct knowledge of sales there. My [fol. 109] point is that even if a real estate agent is going to testify as an expert, that the expert would have to know it was a bona-fide sale, and I say there is no evidence here that it was a bona-fide sale.

The Court: I think you can elaborate on it when you examine the alleged expert.

Mr. Stout: Supposing that is the test as to the sale of this property, what kind of evidence would this Court require? It would require positive evidence that there had been a bona-fide sale of this property. There is no such evidence here and, therefore, a so-called expert going on the stand later cannot take the testimony in this case and use it as the foundation for qualifying him.

There are only two grounds on which the sale of property is admissible: One, to introduce evidence by positive proof of a bona-fide sale in accordance with the statute. The other is that the expert may use it as a part of his qualifying

knowledge to testify, and therefore, as to the qualifying knowledge to testify, that is knowledge that he must have at the time he values the property. He cannot even come into Court and get that knowledge and put a value on a piece of property.

The Court: I think he can, under a case from this County, in the case of the Farrell Hotel against the Power & Light Company.

(After discussion.)

The Court: I will allow it to stand for what value it has.

[fol. 110] EDWARD J. PIERSON SWORN FOR THE RELATORS.

Direct examination.

By Mr. Meyner:

Q. Mr. Pierson, what is your position?

A. I am secretary of the Delaware River Joint Toll Bridge Commission.

Q. As such are you custodian of their records?

A. Yes, sir.

Q. Do you have records of the parcels, descriptions and purchase prices of the properties purchased by the Bridge Commission?

A. I do.

Q. Have you brought them with you?

A. Yes, sir.

Q. Will you please describe briefly the property owned by Michael and Sadie Kolchak, at 10 Broad Street?

A. The Kolchak property was a frame building, two stories on an irregular lot. It was of frame construction, and some small outbuildings, a rather dilapidated garage which formerly had been a chicken coop, and a barn now a garage, and a little building on one corner of the lot used as a woodshed.

Q. Do you have the dimensions of the land?

A. I have it in a book there.

Q. Will you bring it to the stand?

A. (Referring to book.) The Kolchak property was 110 feet on Broad Street, 117 feet on Howell Avenue and 40 feet on Skillman Alley.

Q. Will you show us that on the map?

A. (Indicating.) Here it is.

Q. That is the house?

A. Yes, sir.

The Court: Suppose you identify that, will you, Mr. Pierson?

Mr. Meyner: You might write "Kolchak" on it.

(Witness marks on map.)

The Witness: This map does not show all the buildings here.

[fol. 111] Q. Will you just show about where it is, or do you have a map showing the property?

A. Yes, I have a map here.

Q. Is it detachable?

A. Yes, sir (producing map).

Q. This shows it right at this point (indicating)?

A. That is right.

Q. That is 10 Broad Street?

A. Yes, sir.

Q. How many rooms were there in that house?

A. I do not have the entire description of all those houses.

Q. Do you have some notes? Didn't you have appraisements made?

A. We had some appraisements made, yes.

Q. Do you have your records of appraisements?

A. Yes. (Producing papers.) Do you want the amount that property was appraised for?

Q. Do you want to give it to us?

Mr. Stout: May it please the Court——

The Court: No. Only what it sold for.

Mr. Meyner: I did not ask him that.

Mr. Stout: I take it counsel says he should not tell it.

The Court: He does not want to tell it, anyway.

Mr. Stout: All right.

The Court: And we will not let him tell it.

Mr. Stout: All right.

Q. How many rooms in the Kolchak house?

A. From my record I cannot tell the number of rooms in that.

Q. Do you have the cubic feet contents?

A. Of the building or the ground?

Q. Of the building?

A. No.

Q. You remember it as a two and one-half story frame house?

A. That is correct.

fol. 112] Q. Does your appraisal not contain records of the rooms, the cubic feet?

A. No, they do not.

Q. Do they contain the dimensions of the house?

A. No.

Q. What do they contain?

A. Well, they contain simply the appraisal by our appraisers of the premises as they stood. Those appraisals were not given to us in any detail.

Q. Wasn't the Bridge Commission cognizant of what was a house before paying a price for it?

A. We were guided to some extent by the appraisals put hereon by our appraisers.

Q. Was it a two-story or two and a half story?

A. I would say it was a two-story house. It may have had little attie there. I would not call it a two and a half story house.

Q. What were its approximate dimensions?

Mr. Stout: It seems to me it has got to be the dimensions, if it is worth anything. Now the witness is guessing at approximate dimensions.

Mr. Meyner: If he was familiar with it and saw it.

Mr. Stout: What good is that to the jury?

The Court: I will let him say substantially what the size was if he knows.

Mr. Stout: From his observation, without making any measurement of the building?

The Court: We will take it with that idea, that it is just an approximation.

Mr. Stout: I ask an exception.

The Court: Yes.

A. The house faced on Broad Street and in my judgment the property was about 20 feet front.

fol. 113] Q. And about what depth?

A. I would say possibly 30 feet.

Q. How far away from the Colburn property was it? Could you refresh your recollection by looking at the map?

A. I probably could by this one (indicating).

(Q. (Indicating.) The Colburn property being about there?

A. Yes. Here is the Colburn property. The scale is not on here.

Q. Well, about how far?

A. I would say possibly a thousand feet.

Q. A half a block?

A. About that.

Q. How much did the Bridge Commission pay for that property?

Mr. Stout: I object, may it please the Court. First, it must be shown, before the witness can testify to the value of this property, that it is comparable to the Colburn property.

As it has been said here before, all of this testimony is to qualify some expert later to testify.

The rule laid down in Ross v. Commission of Palisades Interstate Park, in 90 New Jersey Law Page 461, "The dominant circumstances forming the qualification of expert witnesses as to land values consist of the fact either that they "themselves made sales or purchases of other substantially similar land in the neighborhood of the land in question within recent periods or that they had knowledge of such sales by others."

In the case of Essex County Park Commission vs. Brokaw, 107 New Jersey Law; 110, the Court of Errors and Appeals, passing upon this question said, "We think this rule is [fol. 114] correct and that the qualifying knowledge of comparable sales must be such as to be competent evidence if testified to by the proposed witnesses, and if not must be substantiated by competent evidence of others before it can have the effect of qualifying the witness to speak as an expert."

In other words, if this sale or the purchase of this property by the Bridge Commission is to have any evidential value in this case the witness must exhibit by his testimony that there was a comparable—that this property sold or purchased by the Bridge Commission is comparable to the property under consideration.

The testimony here manifestly is that there was no mark of similarity between the properties except that it may have been a two story building. The land area is altogether dis-

similar to the property here. It is located on a different street, and therefore, for this witness to testify as to what the Bridge Commission paid for this property is idle, so far as this case is concerned.

Mr. Meyner: May I be heard, your Honor? It seems to me that if we were to adopt the rule contended for by counsel for respondent we would not be able to show similar or comparable sales unless the property was identically the same, and it is common knowledge that we do not have such conditions.

The purpose of all this testimony that I am trying to bring in here now is to show sales of comparable property or similar property in the neighborhood, so that an expert in looking through the prices paid can get a general understanding of the values then being set upon property in the neighborhood.

(After argument.)

The Court: I will allow him to testify, and you may have an exception.

(Last question read.)

Mr. Stout: If he is going to testify from the book, I do not think he is competent to testify from that.

The Court: As secretary of the Bridge Commission he has charge of the records.

Mr. Stout: Yes, but—

The Court: I assume that the records are accurate.

Were you secretary when they bought this place?

The Witness: Yes, your Honor.

The Court: And you are familiar with the transaction?

The Witness: That is correct.

The Court: And you are using that book to refresh your recollection accurately?

The Witness: Yes, sir.

The Court: I will let him testify.

Mr. Stout: If the book was properly kept—

The Court: I assume he is a competent secretary.

Mr. Stout: With all due respect to the Court, I am trying to assert what in my opinion is proper evidence. The Court has, with all due deference, the right to do as it sees fit, but as I understand it, the orderly way of using a book to refresh a witness's recollection is, even if it is kept by the wit-

[fol. 116] ness himself, to show when he made the records in the book and so forth and so on.

The Court : Did you keep this record yourself ?

The Witness : Yes, sir.

The Court : I will allow him to use it. You may have an exception to the ruling.

Mr. Stout : Very well.

The Witness : For the Kolchak property the Commission paid \$2510.

Q. Did that have any improvements ?

A. As I have testified, I am not entirely familiar with the interior of all of these houses.

Q. Do your records show ?

A. No, they do not.

The Court : When was that sale made ?

The Witness : November 9, 1936.

Q. When was the deed delivered ?

A. On January 12, 1937.

Q. Were you familiar with the land purchased from Claire Reiley Guthrie and others ?

A. Yes, sir.

Q. Where was that located ?

Mr. Stout : May it please the Court may I have a general exception to all this line of testimony ?

The Court : Certainly.

A. The Guthrie tract was a tract of vacant land on Broad Street running through the Chittewink Alley, the rear bounded by Plotts Alley in one direction.

Q. Is that on the map ?

A. No. It is parcel No. 12.

[fol. 117] Q. Does this accurately represent the neighborhood and the location of the properties purchased ?

A. It does.

Q. You were over the land ?

A. Yes, sir.

Q. Before the building of the abutment the streets were laid out pretty much this way ?

A. That is correct.

Q. And the locations of the houses were on the places where the names are ?

A. Yes, sir.

Mr. Meyner: I offer this in evidence.

Mr. Stout: What is the object of the offer?

Mr. Meyner: So that the property can be identified in a much better fashion.

Mr. Stout: All right.

(Paper referred to and offered in evidence is marked Exhibit P-10.)

Q. So that looking at that map and looking over the map marked P-5 you would say the land of Guthrie and others was bounded by Broad Street, Plotts Alley, Chittewink Alley and another property and would be right next to the Devine property on one side?

A. Yes, sir.

Q. What acreage did that have?

A. The tract contained 11330 square feet, more or less.

Q. Was it roughly a hundred feet square?

A. I can give you the exact dimensions.

Q. Yes.

A. It was 103 feet on Broad Street, extending back 110 feet.

Q. What did the Bridge Commission pay for that vacant land?

Mr. Stout: We have the objection noted, your Honor?

The Court: Yes. I think you are getting quite far away.
[fol. 118] You are on Howell Avenue now!

Mr. Meyner: No. Here and here (indicating).

Mr. Stout: That is vacant land.

The Court: What is the character of Howell Avenue, Mr. Pierson? Is it a business section?

The Witness: No, sir.

The Court: Is it residential?

The Witness: Residential.

The Court: And North Main Street, is this not a residential section?

The Witness: In this locality it is a residential section. There are, possibly, one or two local stores there, but I would not say it was a business section.

Mr. Meyner: I will withdraw the question as to the land.

The Court: Yes. I think you better stay around your own yard there.

Mr. Stout: "Back yard."

Mr. Meyner: I can show the properties by a small sketch I have drawn up here to show what was taken and what

was not taken. The bridge ran this way (indicating) and these are the properties taken and they were about two or three blocks away from the property in question. There were no residences here (indicating) but there were residences in this neighborhood (indicating), and I am interested in establishing values in here (indicating).

The Court: Yes, but you have a plot now 100 by 103.

Mr. Meyner: And I have some that are almost identical over in here (indicating).

[fol. 119] The Court: Let us get to those and leave this one out. I will sustain the general objection to this as not being competent.

Q: Were you familiar with the Joseph Stanna property, at 48 Broad Street?

A. Yes, sir.

Q: Will you show where that property is on this map?

A. (Indicating) Corner of Wire Alley.

Q: What were its dimensions, in land?

A. It was 24 by 110.

Q: Was it a single or a double house?

A. Well, it was a rather peculiarly constructed building. It had two entrances and at the same time it was all one when you got inside. I think at one time or another it may have been used for a double house.

Q: About how many rooms?

A. I have no record of the number of rooms that were in there.

Q: Roughly, what were the dimensions of the house?

A. Well, the house probably was about 22 feet front. It took up most of the entire lot. It extended back possibly 35 feet.

Q: Twenty-two feet front and how many feet deep?

A. Approximately 35 I will say.

The Court: Where is North Broad Street on that map?

The Witness: (Indicating) This is North Broad Street.

Q: Looking at this, would this refresh your recollection as to where the house was?

A. No, I would not care to point it out on that.

Q: (Indicating) Is this the house?

A. I would not say from that picture.

Q: Is that the Devine property?

A. It looks to me as though it may be.

[fol. 120] Q. Is that Wire Alley (indicating)?

Mr. Stout: May it please the Court, what is going on now?

The Court: He is just trying to find out whether he can pick it out.

Mr. Stout: This is an exhibit and if it is of any benefit he ought to show what he is referring to.

Mr. Meyner: I am trying to have the man refresh his recollection from this map.

Q. Is that Wire Alley (indicating)?

A. I would not say whether it was or not. It is an air photograph.

Q. Where is Broad Street there?

A. (Indicating.) Back here.

Q. And it is on Broad Street and Wire Alley, is it not?

A. The Stanna property?

Q. Yes.

A. Yes, sir.

Q. Isn't that (indicating) Broad Street and Wire Alley?

A. I think it is.

Q. Then that is the Stanna property?

A. If that is Broad Street and Wire Alley that is the Stanna property.

Q. Is that a frame house?

A. Yes.

Q. Did it have modern improvements?

A. Yes; the house had modern improvements.

Q. A slate roof?

A. I believe so, yes.

Q. Electricity?

A. Yes.

Q. How much did the Bridge Commission pay for that property?

Mr. Stout: Objected to as having no substantial similarity and as to the competency of the witness to testify.

The Court: All right. Where is it located on that diagram on the wall there?

[fol. 121] The Witness: (indicating): It would be right in this point.

The Court: How far is that from the Colburn property?

The Witness: I would say it would be about six hundred feet, six or seven hundred feet.

Q. Mr. Pierson, isn't that map scaled at fifty feet to the inch?

A. That is right.

By the Court:

Q. Is North Broad Street improved in the sense that it has a pavement?

A. At the present time.

Q. Well, at the time this bridge was built?

A. Broad Street was an improved street. It was in rather very bad repair.

Q. How about North Main Street?

A. North Main Street is an improved street.

Q. They both have the same utilities, do they, that is, gas and electric light wires?

A. Yes.

Q. And sewer?

A. I am not familiar with the sewers. I believe they did have sewers.

Q. Both of them?

A. I would say so.

The Court: I think I will allow him to answer.

Mr. Stout: I ask an exception.

The Court: You may have an exception.

By Mr. Meyner:

Q. You may give us the purchase price on the Stanna property.

A. It was \$5250.

Q. What was the date of the contract?

A. February 26, 1937.

[fol. 122] Q. What was the date of the delivery of the deed?

A. That was the date of the delivery of the deed.

Mr. Stout: May it please the Court, I move to strike out the testimony or the evidence of value of a piece of property that sells for \$5000. How can you say that is substantially similar to the property here that in 1919 only \$2900 was paid for? How can you say there is any substantial similarity between two pieces of property, one selling for \$5000 and the other for \$2900?

The Court: I suppose it goes to the weight does it not?

Mr. Stout: No, it goes to the question of the comparability.

The Court: I will allow it to stand, anyway.

Q. Were you familiar with the Fulop property?

A. I was.

Q. That was diagonally across the street from the Stanna property, or across the alley?

A. Yes, on the back.

Q. What were the dimensions of the land?

A. It was 25 feet on Howell Avenue and 90 feet on Wire Alley.

Q. That was 25 feet front and 90 feet in depth?

A. That is correct.

Q. Was that property well kept?

A. Well, yes, that property was in good repair.

Q. Approximately what were the dimensions of the house on that land?

A. I would say it was possibly 22 feet front and extended back possibly 40 or 45 feet.

Q. And about how far distant was that from the Colburn property?

[fol.123] A. Well, it was a little closer than the Stanna property. It was directly in back of the Stanna property.

Q. That had all improvements; so far as you know?

A. Yes, so far as I know.

Q. Slate roof?

A. I believe so. Most of those homes had slate roofs, the majority of them did.

Q. What was the price paid by the Bridge Commission?

Mr. Stout: I object.

The Court: This fronts on Wire Alley?

The Witness: No, The property fronts on Howell Street, with the side on Wire Alley. It is on the corner.

By the Court:

Q. Where is Howell Street, between Broad Street and North Main Street?

A. Yes, sir.

Q. Is Howell Avenue an improved street, such as Main Street and North Broad Street?

A. No. Howell Avenue is not an improved street.

Q. It is a dirt road, in other words?

A. Yes, sir. Probably it had some cinders on it or loose stone, but it was never paved.

Q. Did it have utilities in it, to your knowledge?

A. Yes, they had electric and gas.

Q. This was a one family frame residence?

A. That is correct.

The Court: I will let it go. You may have an exception.

Mr. Stout: All right.

The Witness: The Commission paid \$4200 for the Fulop property.

Q. All of those properties were taken in toto by the Commission, were they not?

A. That is correct.

[fol. 124] Q. And it is upon their site that the bridge embankment now is constructed?

A. That is right.

By Mr. Meyner:

Q. Were you familiar with the Matviak property?

A. Yes, sir.

Q. Was that located next door to the Fulop property?

A. Yes, sir.

Q. Was that in very good condition?

A. The Matviak property was in rather poor repair.

Q. Was that a single house?

A. Yes.

Q. What were the dimensions of the land?

A. It was 25 feet facing on Howell Avenue, extending back 78 feet.

Q. That had an irregular depth, did it not?

A. Yes. It was 68 feet on—next to the Fulop property, and 78 feet on the other side, Howell Avenue, running diagonally.

Q. Was that equipped with modern improvements?

A. I believe it was fully equipped with conveniences.

Q. When you said "poor repair", what did you mean?

A. Well, the exterior in particular was in poor repair.

Q. How about the interior?

A. The interior—I saw the first floor. I was not upstairs. I would say it was in fair condition.

Q. The property fronts on Howell Avenue?

A. That is correct.

Q. How much did the Bridge Commission pay for that property?

Mr. Stout: Same objection.

The Court: I will allow it. You may have an exception.

A. The Commission paid \$2743.

[fol. 125] Q. Were you familiar with the Gleza property?

A. Yes, sir.

Q. Was that next to the Matviak property?

A. That is correct.

Q. Was that a single dwelling?

A. Yes, sir. That was a single, two-story dwelling.

Q. Will you tell me the date of purchase of the Matviak property, the date of delivery of the deed?

A. February 26, 1937.

Q. Going back to the Gleza property, what were the land dimensions?

A. There was a frontage of 21 feet 2 inches on Rose Street, and a depth of 78 feet.

Q. What was the frontage on Howell Avenue?

A. That did not front on Howell Avenue. It fronted on Rose Street.

Q. The Gleza property?

A. That is right. Well, Howell Avenue and Rose Street come together there, or one is really a continuation of the other. There (indicating) is the property in question, and Rose Street comes through here.

Q. Will you point it out on this map?

A. (Indicating on map.) Here is Howell Avenue and here is Rose Street. The property I am discussing at the present time lies right in here.

Q. What sort of a structure did that have on the land?

A. It was a frame building, two story frame building.

Q. What were the dimensions of the building?

A. Oh, I would say—this is just from recollection—I would say it was possibly 17 feet front, extending possibly 35 to 40 feet in depth.

Q. Did it have modern improvements?

A. Yes; that was improved property.

Q. In what condition was it?

A. Well, it was not in the best of condition, either the exterior or the interior. The wall paper was falling off the walls and the bathroom was in very poor repair.

[fol. 126] Q. What did the Bridge Commission pay for that property?

A. \$4000.

Q. Was the Tackacs property located next to that?

A. That is correct.

Q. What was the date of the Gleza transfer?

Mr. Stout: Same objection.

A. The delivery of the deed?

Q. Yes.

A. February 19, 1937.

Q. What were the land dimensions of the Tackae's property?

A. Twenty-one feet five on Rose Street, extending through 78 feet, the same as the Gleza property.

Q. What sort of a structure did it have on the land?

A. It was a frame building, very similar to the Gleza property, a store building.

The Court: A store?

The Witness: A store. It was the only business in this section, a grocery store.

Q. Did the store occupy a room or a room of an ordinary dwelling, or what?

A. That is what it was. It had been a dwelling turned into a store.

Q. There were no structural alterations?

A. No.

Q. Was it equipped with improvements?

A. Yes.

Q. What was its physical condition? A. That building was in fair condition.

By the Court:

Q. How does Rose Street compare with North Main Street?

A. Well, there is no comparison at all, in my opinion.

Q. What is the difference?

[fol. 127] A. Main Street is a paved and improved street, and Rose Street is unimproved, as far as the street is concerned. It is a residential section.

Q. Do they have utilities in the street?

A. Yes, they have the same conveniences as on the other streets.

Q. Are both localities of one family houses?

A. Yes, sir.

The Court: Proceed.

By Mr. Meyner:

Q. How much did the Bridge Commission pay for that property?

A. \$3850.

Q. And the date of the deed?

A. March 18, 1937.

Q. Were you familiar with the Varsa property, located next to the Tackacs property?

A. I was.

The Court: Is this on Rose Street too?

Mr. Meyner: Yes, sir.

The Court: Do you not think you have enough now?

Mr. Meyner: If your Honor please, it would seem to me that a real estate expert would see the whole picture as it was and then it would be very competent, he would be more competent to testify as to what values are there now.

The Court: There is nothing to prevent him from seeing the whole picture. I assume that he knows the place. All you are doing now, as I understand it, is to establish some prices paid for comparable land. You have got five or six in there now.

Mr. Meyner: If your Honor please, I had in mind this: [fol. 128] Here is an entire block and here is an entire block and here is another entire block of residential properties.

The Court: Yes, but I do not want to be burdened with a lot of unnecessary figures. I have permitted you to show now about six, I think.

Mr. Meyner: I have got about half a block.

The Court: Now, if your experts cannot qualify on that I guess they are not much good.

Mr. Meyner: Your Honor, I should like to have that held to on cross examination.

The Court: I have no desire to limit you, but I think you ought to be reasonable about it. You are getting farther away, too. You are getting way down on Rose Street.

Mr. Meyner: There are two of a double type I would like to get in there. I will withdraw my question as to the Varsa property.

Q. Were you familiar with the Zukowitz property?

A. I was.

Q. What number Rose Street was that? Was it 9 Rose Street?

A. I do not know that I have the street address of those properties. Yes, 9 Rose Street is correct.

Q. What were the land dimensions?

A. Forty-four feet on Rose Street, extending back 110 feet.

Q. Was it 44 feet for Zukowitz?

A. No, it was 22 feet. It was half of a double house, Twenty-two feet by 110 feet.

Q. How many stories?

A. Two stories.

[fol. 129] Q. What were the dimensions of the one-half of the double house owned by Zukowitz?

A. Twenty-two feet.

Q. Two houses on the land?

A. The house was double, 16 or 17 feet front.

Q. And about what depth?

A. Oh, I would say in the neighborhood of about 35 or 40 feet.

Q. Was it a frame structure?

A. Yes, with slate roof.

Q. Was it equipped with improvements?

A. Yes, sir.

Q. What was the physical condition of the property?

A. The house was in fair condition; fair plus, I would say.

Q. How much did the Bridge Commission pay for that property?

The Court: What was it, two houses put together with one wall? Is that what you mean by a double house?

The Witness: That is correct, yes.

Mr. Meyner: That is comparable to the Colburn house, which is half a double house.

The Court: The Colburn house is half of a double house?

Mr. Meyner: It has a common party wall and there are two apartments, one up and one down.

A. The Commission paid \$3600 for the Zukowitz property.

Mr. Stout: The same objection and exception.

The Court: Yes.

Q. Tackae's owned the other half of the double house?

A. Yes, sir.

[fol. 130] Q. Was it in the same condition?

A. Approximately, yes.

Q. And had the same improvements and the same dimensions?

A. Yes, sir.

Q. What was the price paid for that?

A. The same price, \$3600.

Mr. Stout: The same objection and exception.

The Court: You may have an exception.

Q. Were you familiar with the Jennie Butler property?

A. I was.

Q. What was on that property?

A. That was directly next to the Zukowitz and Tackacs property and was a three house building—

Mr. Meyner: I withdraw the question.

Q. Were you familiar with the Freihofer baseball field?

A. I was.

Q. How much land did the Bridge Commission take from the baseball field?

A. 42253 square feet.

Q. What acreage is that?

A. I haven't it here. There is no record of the acreage here.

Mr. Meyner: Does it appear on the exhibit, your Honor? (Witness indicates.)

Q. That is this portion of the field (indicating)?

A. That is correct.

Q. Pointing to Exhibit P-10. What was the price paid by the Bridge Commission for that land?

The Court: Objection sustained.

A. Ten thousand—

[fol. 131] The Court: Wait a minute. Do you not think you have enough now?

Mr. Meyner: I was just discussing that with my expert.

The Court: Yes. I think your expert ought to be satisfied now.

Mr. Meyner: Cross examine.

Cross-examination.

By Mr. Stout:

Q. Mr. Pierson, have you had experience in appraising properties in other places?

A. In other localities?

Q. Yes.

A. Yes.

Q. Were these properties that you have testified to acquired without pressure upon the sellers?

Mr. Meyner: I object to that, your Honor, as calling for a conclusion.

The Court: I will allow it.

A. They were purchased without any pressure.

Q. They were purchased without pressure?

A. Yes, sir.

Q. In other words, did you pay to the property owners the amounts that they asked for the property?

A. Well, after negotiations. They all agreed to the purchase price.

Q. They agreed to it after — You did not say anything to them about, "If you don't accept our prices we will condemn the property?"

A. In two cases.

Q. In two of the cases you testified to?

A. No, none of these cases.

Q. In your experience in appraising property in other localities would you say that the property that you have testified to here this morning, as to the purchase price, that those properties were substantially similar to the Colburn [fol. 132] property?

A. I am not entirely familiar with the Colburn property. The Commission was not at all interested in the Colburn property and therefore I had no occasion whatever to examine it.

Q. So you do not know, really, — As to the Colburn property you cannot make any comparison?

A. No.

Q. Are you not in a position to say that the piece of property on Rose Street in the locality of the one piece of property you testified to as to the location on that street, whether it would be substantially similar as to the location of the Colburn property on North Main Street?

Mr. Meyner: I object.

The Court: I will allow it.

A. In my opinion there is hardly any comparison between the Main Street section and this section in which the Bridge Commission acquired these properties.

Q. Then we will say as to the location and surroundings of these properties there was no substantial similarity between the properties that you have testified to the selling price of and the Colburn property?

A. That is correct.

The Court: Yet you say you are not familiar with the Colburn property?

The Witness: I am familiar with the North Main Street section.

Mr. Stout: Familiar with the location, sir. Location is one of the most important factors in determining value. That is all.

[fol. 133] Redirect examination.

By Mr. Meyner:

Q. When you say there is no comparison do you mean the properties you have described would have a lesser value?

A. In my opinion most of them would.

Mr. Meyner: That is all.

WILLIAM SMITH sworn for the Relators.

Direct examination.

By Mr. Meyner:

Q. Are you the holder of a real estate broker's license?

A. Yes, sir.

Q. When were you first licensed?

A. I do not recall the exact date, but it was about the time of the establishing of the real estate commission. I was in the business before the commission license law was passed.

Q. Where were you in the business, in the real estate business?

A. In Phillipsburg.

Q. How long?

A. Since 1919.

The Court: Have you been active in it ever since?

The Witness: With the exception of two years when I was not entirely active, and one of those years I held a license.

Q. Have you made sales of Phillipsburg property?

A. Yes.

Q. Have you made appraisals?

A. Yes, sir.

Q. For whom?

A. Well, I have made appraisals for the railroad companies, financial institutions, the United States Government, the State of New Jersey, and a number of individuals. [fol. 134] Q. How long have you known the North Main Street section of Phillipsburg?

A. About as long as I remember anything. I was born and raised in Phillipsburg.

The Court: How many years is that?

The Witness: That is fifty-one.

Q. Do you have knowledge of sales during that period of time, of property in the North Main Street section?

A. Yes, sir.

Q. Have you heard the testimony given here as to prices paid by the Bridge Commission?

A. Yes, sir.

Q. Did you hear the testimony yesterday as to the prices given for those two properties on North Main Street?

A. Yes, sir.

Q. And in addition you have that knowledge?

A. Yes, sir.

Mr. Stout: Are you through with the qualifications?

Mr. Meyner: Yes.

Mr. Stout: I want to take the witness on qualifications.

Mr. Meyner: Go ahead.

By Mr. Stout:

Q. Mr. Smith, have you in your experience as a real estate broker and agent in Phillipsburg ever bought or sold property in this immediate neighborhood?

A. I have been trying to think. I don't have the available records and I could not at the moment put my finger on a property that I bought or sold in that neighborhood. But I sold so many properties in Phillipsburg that I feel entirely

familiar with every section of the town. I could not put my [fol. 135] finger on a property just at this minute that I sold there.

Q. When to your knowledge was the most recent sale before the building of the embankment for the bridge?

A. That question I cannot answer.

Q. Do you know whether there were any sales of property in this locality or neighborhood in 1935?

A. May I go back to your former question?

Q. Well, we have another one now.

A. Do I know of any sale in that locality during the year 1935?

Q. Yes.

A. No, I don't. If I did know of any sale during that period I would not think it was a matter of value—

Mr. Stout: I move to strike out the last part of the answer as not responsive to the question.

The Court: Strike it out. The answer is "No, I don't".

Q. Do you know of any sales in this location or neighborhood in 1934?

A. No. I said, "No", to your general question—

Q. All right. Now take it in 1933.

A. I will keep on answering "No", I guess. I said I could not put my finger on any sale there.

Q. Well, just answer the questions. If you do not know, that is all. Do you know of the sale of any property in this locality or neighborhood in 1933?

A. No.

Q. 1932?

A. No.

Q. Or 1931?

A. No.

Q. Or 1930?

A. No.

Q. Now, then, the only sales of property that you are familiar with are the ones that were made in 1936 and 1937, as testified to here in this case?

A. Yes. Offhand, I would have to say that.

[fol. 136] Q. Those are the only sales you are familiar with?

A. Yes.

Mr. Stout: May it please the Court I object on the ground that the witness is not qualified to testify, on the ground that

the qualifying knowledge of an expert is that he must either be familiar with sales in that he made them himself or he has knowledge of the sales. How can he say as to what the value of the property was in 1930, 1931, 1932, 1933, 1934 or 1935? He evidently did not keep track of sales if there were any sales in that neighborhood. And the sales that come along in 1936 and 1937 would not qualify him as a witness to testify as to the value of the Colburn property at the time of the building of the embankment of the bridge. They claim that they were damaged by the building of that embankment. In other words, at the time of the building of the embankment of the bridge, this witness hasn't any knowledge upon which to predicate his value of this property. He says he was making sales in other sections of Phillipsburg but he has not made any sales and does not know of any sales up to 1936.

By the Court:

Q. How many sales have you made in Phillipsburg in the last five or six years, generally?

A. Well, in the last five or six years I did not make many sales. I would say I did not sell more than \$70,000 worth of property, I believe, in the last few years.

Q. In the last five or six years?

A. Yes.

[fol. 137] Q. And prior to that?

A. Well, prior to that, I would say I averaged about a sale a week and a great many weeks I had two sales. I often had two closings in one day. When real estate was moving I was moving too. Of late years there has been so little action with the sales I made, that were not made by willing buyer or a willing seller—there does not seem to be any market of that kind today.

The Court: Well, they are presumptively willing, guess. I suppose he means the seller wanting to get more and the buyer wanting to get it for less. Is that it?

The Witness: It is a matter of "I want to get out of here. How much can I get for it?"

By Mr. Stout:

Q. You say in the last five or six years you have sold \$70,000 worth of property in Phillipsburg?

A. Approximately \$70,000 worth of property.

Q. Can you name one property you sold in the last five years?

A. I would say offhand the Airport Hotel property on the Washington Highway.

Q. You would not say that was in any way substantially similar to the Colburn property, would you?

A. No. I did not have that in mind. I was trying to answer the question.

Q. What other property did you sell?

A. If you want a property comparable to the Colburn property—I would not say it is comparable because it is a brick one story bungalow in the new section of the Phillipsburg Development Company on a corner lot. That was bought by Mr. Cahill from a Mr. Lora.

[fol. 138] Mr. Stout: May it please the Court, I renew my motion. The witness has further testified that so far as sales that he has made are concerned they were not sales within the statute, as I think your Honor will take judicial notice.

In my experience I have attempted to present sales to the Court—I had one case where a piece of property was assessed at \$330,000 and was sold for \$60,000, at a bona fide sale, that is between a willing purchaser and a willing seller, and the Court took the attitude that it was a depressed market and it was not evidence of the value of the property and consequently the sale could not be a bona fide sale and there was, therefore, no indication of the value of the property.

We know that today real estate is in such a terrible situation that we cannot hardly get enough out of real estate to pay the carrying charges, let along any return on the investment.

So that when the witness has testified that he knew of no sales of property in this neighborhood for six years and that sales made after that of his knowledge were sales that were made where the seller was ready to take what he could get out of the property—That is the general attitude of the seller today. So I say the witness has no knowledge of any sales except this incompetent evidence as to the sales here in Phillipsburg to qualify him. And I say he has got to be qualified up to 1936 as well as after 1936 to testify as to the value of this property or any diminution in the value of it.

[fol. 139] The Court: I am going to accept him as an expert. You may have an exception to the ruling.

By Mr. Meyner:

Q. Were you familiar with the North Main Street section of Phillipsburg before the building of the bridge?

A. Yes, sir.

Q. Does this picture (indicating) accurately represent the condition of that neighborhood before the building of the bridge?

The Court: What is the exhibit?

Mr. Meyner: Exhibit P-4.

A. Yes.

The Court: How many years have you been familiar with that neighborhood?

The Witness: Oh, as a little boy I used to go up here to baseball games, all my life, and my father was in the tea and coffee business and I rode over the entire town with him on the wagon. I know the entire town very well, Judge. I used to carry newspapers up there.

Q. Have you examined the Colburn property?

A. Yes, sir.

Q. Have you been in it?

A. Yes, sir.

Q. Have you made measurements of it?

A. Yes, sir.

Q. Will you tell us briefly what it consists of?

A. (Referring to paper:) It is one side of a two and a half story double frame and has an extension roof with slab. It has electricity, gas and bath in each apartment, city water and sewer. There is an automatic gas hot water heater in [fol. 140] the cellar, and a Holland Hot Air furnace. Six rooms and bath on the first floor and five rooms and bath on the second floor.

Q. Where are the bedrooms on each floor?

A. In the rear, in the extreme rear.

Q. Facing what is now the embankment?

A. Yes, sir.

The Court: What is the size of the lot?

The Witness: Approximately 25 by 112.

Q. What is the size of the house?

A. The house is—the front is 20 feet. The depth is 50 feet 8 inches.

Q. Are there any attic rooms?

A. No. The attic is not finished.

Q. Do you have the cubic feet content?

A. Yes, sir; 23105 cubic feet.

Q. Do you know what buildings were behind that Colburn property before the building of the bridge?

A. Yes. I knew the old stove works when I was a youngster and used to play up there.

Q. Did you know the silk mill?

A. Later I understood there was a silk mill. There was the Bachman Planing Mill there. Mr. Leidy used a building for a display room and warehouse for his electrical equipment and supplies.

Q. Was there space between those buildings?

A. Yes, there was.

Q. Behind the Colburn property what was the average height of that silk mill?

A. Offhand, I would say it was 20 feet or 22 feet; I am not sure.

Q. Were you familiar with the streets in that neighborhood?

A. Yes, sir.

Q. Could you refresh your recollection by examining those maps and tell us what streets were there before the building of the embankment?

[fol. 141] A. (Referring to map.) There was First Street and the railroad and Second Street and Howell Avenue coming out into Second Street, and Rose Street adjoining Howell Avenue, and Broad Street, which went as far as Second Street, and Chitewink Alley and Plotts Alley—I did not know the name of it but I knew it was there—and Wire Alley.

Q. Were most of those streets abandoned after the building of the bridge?

A. Yes, they were abandoned at this point (indicating).

Q. Were there houses over in this section which is now vacant?

A. Yes, sir.

Q. And were they taken away?

A. Yes. They are no longer there.

Q. Has that abutment any underpass?

A. No.

Q. Do you know about how high that embankment is in back of the Colburns?

The Court: We have been all over that. It is 35 feet. There is no dispute about it.

Q. In your opinion, based upon your experience as a real estate man and based upon your knowledge of the sales of which there has been some testimony, would you say the Colburn property was depreciated by the building of this embankment?

Mr. Stout: May it please the Court, I object.

The Court: I will sustain the objection.

Q. In your opinion, Mr. Smith, did the Colburn property have a lesser value after the building of the embankment than it had before?

Mr. Stout: The same objection.

[fol. 142] The Court: Why do you not ask him what it was worth before and what it was worth afterward?

Q. What was the property worth before the building of the bridge abutment?

Mr. Stout: I object, may it please the Court. When?

The Court: Immediately before the building of the embankment, was my thought.

Q. Do you know when the embankment was built?

A. Yes.

Q. About when?

A. The embankment was built in the winter and spring of 1936-1937.

The Court: It was the summer of 1936, was it not?

Mr. Meyner: No. It was 1937.

Mr. Stout: I have the further objection to make, that this witness has been accepted by the Court as qualified as an expert. I say there is not any testimony before the Court or jury which would qualify this witness to testify as to the value of the Colburn property in 1936 before the building of the bridge or the embankment of the bridge. He may be a qualified expert upon the value of property but there is nothing here that we can rely upon to base his opinion. He did not keep in contact with the sales of property in that locality, if there were any. He did not make a study of the values. How does he know? He might know the value of property somewhere in Phillipsburg but he does not apparently know the value of property here, on the tes-

[fol. 143]

timony thus disclosed, because the sales he relies upon were all after the time fixed by this date, and consequently he cannot rely upon that. What has he got as the basis of forming an opinion of the value?

The Court: Well, he has the sales of what are now supposed to be comparable properties, that he heard testified to.

Mr. Stout: But that was long after this.

The Court: Well, that is the only sales in that neighborhood.

(After discussion.)

Mr. Meyner: If your Honor please, the properties were purchased before the building of the embankment. The properties were purchased in the latter part of 1936 and 1937. The embankment went through in 1937, and these are sales in that neighborhood in 1937 at the time he is establishing his value.

(After further discussion.)

The Court: I will allow him to testify. You may have an exception, Senator Stout.

Q. What was the value of the Colburn property in the summer of 1937, before the building of the embankment?

A. \$4742.

Q. What in your opinion was the value of the property after the building of the abutment and walls in February of 1938? O

Mr. Stout: I object. May it please the Court, that is bringing out the very question that I had before the Court before. The witness uses the sales that are here in evidence to determine the value before the building of the bridge abut- [fol. 144] ment, and certainly he cannot use those sales to determine the value of the property after the building of the abutment or approach to the bridge.

The Court: I think you are right at this point, Senator. He is not shown to have made any study of this place after the building of the embankment.

Mr. Meyner: We have two sales.

The Court: I mean the Colburn property, itself.

Mr. Stout: Furthermore, is this not another way of showing diminution in value by reason of the building of this embankment?

The Court: I think so.

Mr. Stout: And the courts have laid it down that no witness—God never created a man who could say to what extent this property had been damaged by the building of the abutment. The question of the diminution in value is one thing the witness cannot testify to. He can testify as to the value of the property before the diminution in value, but he cannot testify to the value of the property, taking into consideration diminution of value.

(After argument.)

The Court: I think you ought to qualify this man as to his examination of the place after the construction of the embankment.

Q. Did you examine the property after the building of the embankment?

A. Yes, sir.

Q. And you made an investigation of any changes or looked for any changes?

A. Yes, I have noted the changes in the property and in the general neighborhood.

[fol. 145] The Court: What are they?

The Witness: This property is pretty close—it is about 60 feet from the rear of the house to the embankment. I would say there is heavy trucking crossing this bridge, going west on Routes 22 and 28, particularly going west. The trucking is too heavy to cross the free bridge and it must cross this toll bridge, and while there are two ways for it to go west—some go east and some go west, and if they go on the new road to Union Square that does not make any noise at all, but if they go down North Main Street there is too much additional heavy traffic. Now, the traffic on Routes 22 and 28, going west, must come down past that property. They turn to the right, and watching it I find there are as many or more use North Main Street as use the new roadway to the approach or to the embankment of the bridge. On the other hand they are deprived of sunlight earlier than they were heretofore.

Q. By reason of the embankment, do you mean?

A. By reason of the embankment.

Q. And what else?

A. They have additional noise. A truck going across that bridge, going toward the toll gate, must stop. The toll gate

is on the Jersey side. They make noise, particularly with those heavily loaded, where they must use the brake. And I stood there and heard them backfiring, myself, and heard the grinding of the brakes. Those are things they were not accustomed to before. There is no doubt the value has been very greatly impaired.

The Court: What view did they have before?

[fol. 146] The Witness: The view of the nice hill-side verdure on the other side and the river bank.

The Court: What view have they got now?

The Witness: Practically the bank. Before that it was the sky, and not much of that now.

The Court: Before that they had a view of a lot of abandoned factory buildings.

The Witness: In the rear, yes, but they were not so close, and the silk mill was not so high.

The Court: Well, they were there.

The Witness: They were there, but they were not as close as this embankment is.

Q. What is the condition of the hill on the other side of the river?

A. Do you mean on the Pennsylvania side of the river?

Q. Yes. What do you see?

A. Just the wooded section there.

The Court: That is all you can see?

The Witness: You can see the college buildings and some nice homes.

The Court: You could not see the Delaware River itself?

The Witness: No.

The Court: It is the opposite bank?

The Witness: It is the opposite bank.

The Court: That is a distance of how far?

The Witness: Across there, that is down to the opposite bank of the Delaware River?

The Court: Yes.

The Witness: Well, roughly; I would say it is an eighth of a mile.

[fol. 147] The Court: Has the bank been sodded? Is there grass growing on it?

The Witness: There was an attempt at it, but it seemed to just wash out and it is very unsightly at the present time. There is a lot of stakes stuck in there to hold it together.

The Court: It is a normal slope?

The Witness: Well, yes, but it is rather a steep slope.

The Court: Well, what else is different about this now?

The Witness: The accessibility. Heretofore they could go down across Second Street or Third Street and go to the river, and now they have to go to Union Square and down to Third Street in the other direction.

The Court: Does that make any difference?

The Witness: I do not know as it makes any particular difference. But there are people who like the river and do considerable fishing and that far it makes considerable difference.

The Court: They are better off than they were before, are they not?

The Witness: No.

The Court: Do you think these things you mention have any effect on the market value?

The Witness: I think they do. And another reason is because the community is more or less knocked out. What they used to call the North End. There is no North End now.

The Court: What was this community, a couple of houses among a lot of factories?

[fol. 148] The Witness: No. I mentioned a lot of factories. The factories were—— For example, the old horseshoe works was on the other side of the railroad, and so was the rolling mill and the cooperage plant.

The Court: Now, instead of having a lot of abandoned buildings in the rear yard, so to speak, you have a 35 foot embankment?

The Witness: Well, the abandoned buildings were not in the rear yard.

The Court: They were as close as the embankment.

The Witness: They were close but they were not as close as the embankment. I believe your Honor has the opinion these buildings were wrecked. They were not wrecked.

The Court: Well, after all, you think that had some effect on the market value, do you?

The Witness: Yes, sir.

The Court: How much?

The Witness: I would say approximately forty per cent.

The Court: What is that, in figures?

The Witness: Well, if the present value of the property

is depleted forty per cent its present value would be \$2845.20.

The Court: So that it is your opinion that by reason of this construction there has been a diminution in the value of the Colburn property to the extent of forty per cent?

The Witness: Yes, sir.

The Court: Cross-examine.

Mr. Stout: I think I should move to strike out the testimony [fol. 149] which the Court elicited upon the ground that it is not proper testimony. I mean, that the witness cannot testify to the diminution in value.

The Court: I will allow it, and allow an exception.

Mr. Stout: I ask an exception, your Honor.

Mr. Meyner: May I ask one additional question?

The Court: All right; I thought you were through.

By Mr. Meyner:

Q. Before the building of the bridge were there houses in this block (indicating)?

A. Yes, and this block (indicating).

Q. And that extended down several blocks?

A. Yes, sir.

Q. And that is what you meant when you said that was away from those other houses?

A. Yes, sir.

Mr. Meyner: Cross examine.

Cross-examination.

By Mr. Stout:

Q. You heard the testimony of Mrs. Colburn, that in 1919 they paid \$2900 for the property?

A. Yes, sir.

Q. You would not say that the property, if the bridge had not been built, was more valuable in 1936 and 1937 than it was in 1919, would you?

A. Yes, unquestionably.

Q. Why?

A. In 1919 we did not have the high value. There wasn't any particular action in real estate. The values were not as high as they are now. The wages were not as high. [fol. 150] for example. I sold properties in 1920. I started

in business in 1919, and I sold properties then for in the neighborhood of \$2500 or \$2600 that within a few years brought \$3600 and \$3700, without any improvements to the property. The values did essentially rise since 1919.

Q. In 1919, that was shortly after the Armistice, the end of the World War?

A. Yes, sir.

Q. And wasn't there a shortage in houses after the War?

A. There was a shortage.

Q. Didn't rentals advance and people pay more rent for property in 1919 than they did previously?

A. There wasn't any particular advance in rents in our location. Phillipsburg never did collect rents for its property.

Q. Nowhere in Phillipsburg?

A. No general advance.

Q. There was no general advancement in the value of property in Phillipsburg?

A. Yes, there was a general advance in value, but the advance in rent was not comparable to the advance in the market value.

Q. Now you say there was a general advance in rent?

A. No.

Q. But there was a general advance in value?

A. In the market value of property.

Q. In 1919?

A. Yes. Not in 1919, no, but in the years immediately succeeding 1919.

Q. When did the valuation first advance in amount, in other words, in 1918, after the World War?

A. Well, as soon as there became plenty of action, naturally the prices seemed to go up generally, and that was in I would say maybe 1921 or 1922 when there was plenty of shortage of rooms. People were forced to pay because they could not find available space to rent.

Q. Do you mean to say, then, that if this property was [fol. 151] worth \$2900 in 1919, that if this property had not been built in 1936 or 1937 it would be worth \$4200?

A. I said what it would be worth. I figured about \$4742.

Q. In other words, this building which was eighteen years old, in that period of time from 1919, with all of those years of physical deterioration and obsolescence, yet you would say there was not a depreciation in value of over a hundred per cent?

A. I was not familiar with the property in 1919, the date you are speaking of, but there is evidence in the property that it has been enlarged. There has been additional bathrooms put in and there has been additional cubic content added to the property. There is no question about that. That was added since its construction, and I would suppose it has been added since they bought it.

Q. If you were determining the value of a piece of property the best evidence of the value would be the sale of the property, would it not?

A. Not always. Because you have no sale for property does not say the property has no value.

Q. Is not a bona fide sale of a piece of property in the market the best evidence of its value?

A. No.

Q. In other words, where two parties are willing, one to sell and the other to pay for a piece of property, that is not the best evidence of what it would sell for?

A. No. I think—

Q. All right. You have answered. Well, the so called improvements in this property—You do not know what they were—I mean, in value?

A. No. I do not try to value them separately. I really do not know what they were. But I say there is evidence, to look at the building, that there has been additions and extensions made to it.

Q. When you say the property is worth \$4700 in 1936 and 1937—1937, I think you said—what do you predicate [fol. 152] that upon?

A. Upon the value of the land and the cubic content of the house and the capitalization.

Q. What was the cubic content of the building?

A. The cubic content of the building is 23105. Now there might have been a tenth of a fraction there, I do not recall.

Q. You are talking about the replacement value of the property, I take it?

A. Yes, sir.

Q. What price per cubic foot did you apply to the construction?

A. Twenty cents.

Q. And that gave you a valuation of—

A. \$4621.

Q. How much did you depreciate it?

A. The effective depreciation on the property in my opin-

ion is twenty years, or, in other words, it is four-fifteenths depreciated.

Q. How old is the building?

A. Twenty years. I do not know the age of the building. I say, the effect of the age.

Q. What is the age of the building?

A. I have no idea.

Q. In other words, you can properly appraise, can you a building without knowing its age?

A. Yes, I think every building shows an effective age. For instance, you might put up a building five years ago and today it might look as if it stood there for a hundred years.

Q. Yes, but talking about the same building, built identically the same, one built thirty years ago and the other twenty years ago, would they both have the same depreciation?

A. No; they would not have the same depreciation.

Q. Therefore, isn't age a factor in determining the depreciation of a building?

A. Yes, sir.

Q. And yet you do not know the age of the building?

A. I do not know the age of the building.

[fol. 153] Q. What enters into depreciation? When you speak about this building—

A. Ordinary wear and tear and neglected repair.

Q. Isn't that deterioration rather than depreciation?

A. It is also depreciation.

Q. Isn't there anything else in depreciation beside deterioration?

A. I do not think that question is answerable.

Q. You have heard of the word "obsolescence"?

A. Yes, sir. I do not think this property is obsolete, because it probably would not be worth any more money in other places than it is here. The property is not too good for the section.

Q. In other words, do you think that if the Colburns were going to build a house upon this land in 1937 they would construct one just the same as this one?

A. No.

Q. They would have it more modern, would they not?

A. If they wanted to construct it on this identical lot they would have to construct it practically the same because

the lot does not have the frontage to construct a modern building.

Q. You could construct a modern building upon a plot of land 25 feet by 100, couldn't you?

A. You could.

Q. You did not figure in your depreciation of this property, any obsolescence?

A. No. I don't feel there was any obsolescence there.

Q. You figured physical deterioration, as you say really it was, for a period of twenty years, at what rate per year?

A. Well, everybody has their own opinion, but I figured the house had outlived four-fifteenths of its usefulness; that it had spent four-fifteenths of its usefulness.

Q. In other words that would be a little over a thousand dollars?

A. Well, it is \$1232.

Q. That is the deterioration?

A. Yes, sir.

Q. That makes the sound value of the building how much?

[fol. 154] A. It makes the sound value of the building \$3389. In addition to the value of the building, there is a two car cement block garage on the rear, which was built for that purpose but cannot be used for that purpose because there is no access. It is a two door building. There is a bad crack in it. There being no finished attic in this property, and there being two families living in the house, they need room for storage, and I placed a value on it of \$100.

Q. That makes the total valuation then—

A. With improvements, \$3489.

Q. What value did you put upon the lot?

A. I put a front foot value of \$30 per foot, making a valuation of \$750 on the lot.

Q. That makes a valuation of \$750?

A. Yes, sir.

Q. Added to what?

A. Added to \$3489.

Q. That gives you what?

A. \$3489.

Q. And adding \$750 to that gives you—

A. \$4239.

Q. I thought you said a while ago, \$4700?

A. I did. I said that was the value of the property. I told you I considered capitalization in it too.

Q. You did not then arrive at the value of this property by adding the sound value to the amount of the value of the land?

A. No, sir, not entirely.

Q. Because you got a total valuation of \$4700, did you not?

A. Yes, sir.

Q. Therefore this property was worth more than the value of the land added to the value of the building?

A. I do not understand that.

Q. Well—

(Last question read.)

{fol. 155] A. The property was worth more than the value of the land added to the value of the buildings?

Q. Yes.

A. I gave the valuation of the property as \$4742.

Q. And you have given the value of the buildings at thirty-four hundred and something, and the value of the land, \$750. So, therefore, in your opinion the value of this property was between three and four hundred dollars more than the value of the land added to the value of the buildings?

A. The proposition of potential income—

Mr. Meyner: If your Honor please, I think he should say "Reproduction Cost", instead of "Added to the value of the land and improvements".

The Court: It is cross examination. I will allow it.

Q. In other words, you put the sound value on these buildings around \$3300, did you not?

A. It is \$3489.

Q. \$750 for the land. So, then in your opinion in 1937, with what it would have cost to produce these buildings in the condition that they were then, and what will have to be put into the land when the buildings were put upon the land in the condition the land was then, it would have a value of three or four hundred dollars more than the cost?

A. You have got a peculiar proposition here. You have one side of a double house. If you are going to—

Mr. Stout: I am asking for a responsive answer, may it please the Court.

Q. The simple question is this: Didn't you put a higher [fol. 156] value upon this Colburn property of some three

or four hundred dollars more than what you figure the sound value of the buildings to be plus the value of the land?

A. Exactly, because—

The Court: "Yes", is the answer.

Mr. Stout: That is all.

Re-direct examination.

By Mr. Meyner:

Q. Now, Mr. Smith, did you rely solely on reconstruction cost?

A. No; I capitalized it.

Q. What do you mean by "capitalization"?

A. Well, I took the cost of maintenance, the taxes and insurance and water rent and possible vacaney.

Q. What figure did you get with capitalization?

A. \$5245.80. That is the capitalization value.

Q. In other words, you took the expense of operating—

Mr. Stout: Will you let him testify?

Q. Will you explain the method of calculating it?

A. The cost of maintenance of the property, the charges of taxes and water rent and assumed vacaney. In this case, there being two apartments, I allowed one month's vacaney and I allowed one month's rent and that gave the figure for maintenance, \$271.31. The owner, occupying the first floor, I assume their rent was worth \$25 per month or \$300 per year. The tenant on the second floor said that they paid \$25 per month, or \$300 per year. That \$25 payment includes gas and electric, hot water and heat. I assumed that that would cost, this gas and electric and hot water and heat, would cost the landlord \$100 per annum, which makes a [fol. 157] total gross income of \$500. The expenses, \$237.71, leaves a balance of \$262.29, and I capitalized it at 5%, that being the prevailing rate of interest in Phillipsburg. Senator Stout takes exception, and no doubt my capitalization rates might be different in Hudson County, but it is 5% in Phillipsburg.

Q. What is the reconstruction cost then?

A. Including the land?

Q. Yes.

A. \$4239.

Q. And then you have the capitalization cost?

A. \$5245.80.

Q. And then you have the third cost?

A. No. I took these figures and averaged them and tried to arrive at the value of the property. I did not want to use the capitalization cost or the reproduction cost, but I felt the proper thing to do would be to get an average to determine the value.

Re-cross examination.

By Mr. Stout:

Q. What valuation did you arrive at of this Colburn property in 1937 by using the income of the property as a basis for determining its value, using all those factors?

A. \$5245.80.

Q. And then you had forty-three hundred and some dollars on the other?

A. \$4239.

Q. Well, you practically added those two together and divided by two, did you not?

A. Yes, sir.

Q. Is the son, who lives on the second floor, paying the same rent now as he did before the building of the embankment?

A. He is paying the same rent that he did at that time, immediately before. I have forgotten what he told me he paid several years back, but at the present time he is paying—

[fol. 158]. Q. In other words, what was he paying in 1937, what rental?

A. \$25 per month.

Q. And what does he pay now?

A. \$25 per month.

Q. Then did you assume a rental for Mr. and Mrs. Colburn, of the other portion of the house, what it would be worth?

A. I had to.

Q. What rental did you put on that?

A. The same as the son is paying.

Q. Twenty-five above and twenty-five below?

A. Yes, sir. The apartment below has one more room than the apartment above.

Q. I did not ask you that. I asked you what rental you put on the first floor and you said the same as on the second.

A. Yes, sir.

Q. So that in determining the value of this property after the building of the bridge approach you used the same rental?

A. No, I did not. I had that in mind in determining the value.

Q. What rental did you take for the second floor after the building of the embankment?

A. After the building of the embankment I took a rental of \$16 for each floor.

Q. Although Colburn was paying \$25 for it?

A. Yes, sir.

Mr. Stout: That is all.

(At 1:00 o'clock in the afternoon a recess was taken until 2:00 o'clock in the afternoon.).

[fol. 159] VINCENT P. BRADLEY, sworn for the Relators.

Direct examination:

By Mr. Meyner:

Q. Mr. Bradley, what is your business?

A. Real estate.

Q. Where are you engaged in the real estate business?

A. Trenton, New Jersey.

Q. How long have you been engaged in the real estate business?

A. Pretty nearly thirty years.

Q. Do you hold a real estate broker's license?

A. I do.

Q. With what firm are you connected?

A. W. M. Dickinson & Company.

Q. Are you connected with any real estate association?

A. Yes, with our local Board and the State Association and I was a member of the New Jersey Real Estate Commission for about twelve years. That is the body that has charge of the issuance of licenses to real estate brokers and salesmen for the purpose of regulating them in their business.

Q. Did you ever see this neighborhood before the building of the bridge?

A. Yes, I did.

Q. Have you examined, heretofore, this map showing conditions in this neighborhood before the building of the bridge abutment?

A. I have.

Q. In detail?

A. Not in detail, other than to be familiar with the appearance of it as I passed by both by automobile and train, not stopping for the purpose of examining it.

Q. But you have examined this property?

A. Oh, yes, I examined the property.

Q. And you have examined this map (indicating)?

A. I have.

Q. Would you say that this picture represents the neighborhood when you saw it before the building of the abutment?

[fol. 160] Mr. Stout: May it please the Court, it seems to me that if the gentleman has only got what you might call a passing knowledge of the condition here as he went by in an automobile or on a train, I do not know how he could say that a photograph correctly depicts something he has not seen himself.

The Court: I think there is a lot to what you say.

Mr. Meyner: If your Honor please, I am just trying to qualify him, and it seems to me I am allowed the privilege of trying to qualify the witness.

The Court: Go ahead.

Mr. Stout: I ask an exception.

The Court: Note an exception.

(Last question read.)

A. I would say that it does.

Q. Do you have knowledge of the sales to the Bridge Commission of the properties in this area (indicating on map)?

A. I have.

Q. Do you have knowledge of a sale of real estate by Emma Parks, of 179 North Main Street?

A. I do.

Q. Do you have knowledge of the sale to a Rose Bachman, of 153 North Main Street?

A. I do, yes.

Q. Have you examined the neighborhood since the building of the bridge abutment?

A. I have.

Q. In what way?

A. By going to the premises and inspecting between 15 and 25 dwellings and picking some of that total group from the different portions of the area affected, fronting on Main Street, where the houses now exist, and by going to each of those houses and making a thorough examination of the [fol. 161] interior and meeting the tenants and owners and acquainting myself with the type of building and the rents paid, to form my impression of the neighborhood, which I would not be able to acquire in any other way, because by previous knowledge of the property would be passing by in an automobile a number of times. This time I went into these houses and made the inspection referred to and acquainted myself with the conditions in that fashion.

Q. Did you examine the Colburn property?

A. I did.

Q. Did you make measurements of it?

A. I did.

Mr. Meyner: I am finished with the qualification questions.

By Mr. Stout:

Q. Mr. Bradley, when did you first acquire more than a passing knowledge of the property in the locality here under consideration?

A. I would say about ten days ago, ten days or two weeks ago.

Q. You are not familiar with or have knowledge of the sale of property in this neighborhood going back over a period of five or six years prior to the time that you investigated the property?

A. No, only from hearsay, ascertaining what others would tell me about the area when I talked to them. I have no intimate knowledge based upon sales that I made or that I was familiar with at the time of making.

Q. So that you had no knowledge prior to ten days ago of the value or the trend of value of property in this locality?

A. No, not other than I have just outlined to you.

[fol. 162] Mr. Stout: It seems to me, may it please the Court, that the witness is not qualified.

The Court: I am inclined to agree with you.

Mr. Meyner: If your Honor please, the test laid down in
ss v. Palisades Interstate Park Commission is that the
timony of the expert who is offered or who is sought to
offered, that he must have made sales or must have knowl-
edge of sales.

The Court: It must be actual knowledge or based upon
unpetent proof.

Mr. Meyner: We have in testimony of sales.

The Court: He did not hear it.

Mr. Meyner: May I ask that the stenographer read that.

The Court: No.

Mr. Meyner: That is coming from information that they
l.

The Court: No. It is based upon hearsay. It is what
told him they testified to.

Mr. Meyner: If your Honor pelase, it would only take
minutes to put in that proof.

The Court: He does not satisfy me as being an expert
this problem, to give us any assistance.

Mr. Meyner: The man has widespread knowledge that
ould carry over to this particular case.

(After discussion.)

Mr. Meyner: This testimony is in the record. He has the
ne knowledge that is in the record. It seems to me I
sl. 163} should have an opportunity of giving him the
ne knowledge that is in the record.

The Court: I do not think the Farrell case goes that far.
addition to that, on aside from that, here is a man who
y has a passing acquaintance such as I might get by pass-
through Phillipsburg. There has been no special study
properties in that location prior to the erection of the
bankment.

I think Senator Stout is right. He does not satisfy me
an expert. That is the first obstacle you have to over-
come.

Mr. Meyner: I would like to make a request that the testi-
ny be read back to the witness to qualify him on these two
es.

The Court: No. I deny that request. You may have an
ception.

Mr. Meyner: Well, secondly, under the cases it would
em to me he is qualified, under the Brokaw case.

The Court: No.

By Mr. Meyner:

Q. In your experience as a real estate man, and after viewing the premises, what factors would you say would lessen the value of the property?

Mr. Stout: I object to that.

The Court: Objection sustained.

Q. When you examined the Colburn property what sort of a property did you find?

Mr. Stout: May it please the Court, what difference does it make what kind of property he found, if he is called here [fol. 164] as an expert?

The Court: I suppose he could testify to the facts that he found there. I see no objection to that.

Mr. Stout: Is he now turning himself into a fact witness, or is this on the question of qualification?

The Court: I suppose it ultimately turns to an attempt to qualify him. I see no objection to the question alone. I will permit him to tell what he found when he examined the place. Note an exception.

A. I found 99 North Main Street, Phillipsburg, New Jersey, a two and one-half story frame house, semi-detached, a two-family house with slate roof or slag roof, on a lot 25 by 112. I found it connected by city water and sewer. I discovered a storage building in the rear, 12 by 18, of concrete construction with cement floor and apron. I found a dwelling house 20 by 50 feet with a cement cellar floor below, and a hot water heater and gas heater for domestic hot water requirements of each apartment. The first floor had six rooms and bath of three pieces. On the second floor, five rooms and three piece bath. There is a bedroom in the rear of each floor, with windows looking out on the rear embankment. I found the first floor plan consisted of a 6 foot entrance hall with an open stairway and a hall upon which a large living room and dining room were, on the first floor, and there was another room in back of that, two large bedrooms. The living room was 12 by 12 with a bay window space extra; the dining room, 12 by 12; two bedrooms 10 by 13 each, and bath approximately 6 by 6. Each apartment had an electric refrigerator. There are white pine floors [fol. 165] in all the rooms but one, which was a maple floor.

Q. Did you examine the bank to the rear of this property?

A. I did.

Q. What sort of an embankment is that?

A. It is an embankment of recent construction, which was indicated by the fact that it is sliding now. I found that it reached a point in the rear, opposite the rear of the storage building, divided from it by some space or what looked to me like anywhere from 25 to 40 feet. I found that by examining the bank from the house windows that it obstructed in part the view over the property beyond it or the area beyond the embankment. It seemed to me as I looked at the embankment from each of the windows that I was looking into passing trucks and sniffing the odors and hearing the backfires and observe that it was a pretty poor place in the rear of these properties where I found the bedrooms with good sized windows from which views could be had of that condition.

Q. What did you find concerning the neighborhood between the property and this wooded hill?

A. I found a number of houses fronting on Main Street facing an embankment of some height, wooded, which was on the opposite side of Main Street from these houses. I found in my examination of the property that many of them were modern houses with some of the latest appointments; a number of them very well kept and occupied by people holding positions that gave them a reasonably good income, and excellent housekeeping, and I found in those houses or many of them a very orderly and rather a nice type of people.

Q. What would you say as to the opportunity for further development of that neighborhood between the embankment and the wooded hill?

[fol. 166] Mr. Stout: Objected to.

The Court: Objection sustained.

Mr. Meyner (after discussion): It would seem to me that it is perfectly proper to ask this witness the type of neighborhood, whether it is—

The Court: He has already answered that.

Mr. Meyner: Whether it is possible to develop it further with these conditions.

The Court: I will sustain the objection.

Q. Was this neighborhood very readily accessible?

A. Do you mean accessible to the nearby community center?

Q. Yes.

A. No, I found it was not, in so far as any direct reaching of the center was made available. You would have to go some length on Main Street to reach it. There were no cross streets that would carry you over directly without going two blocks one way and two or three blocks the other way. So, from that standpoint, it is apparent the houses would not be accessible to the center of Phillipsburg except by Main Street and going directly to the center that way.

Q. On the basis of your experience in real estate would you say that this condition affected the value?

Mr. Stout: Objected to.

The Court: Objection sustained.

Q. With respect to the improvements you found in the Colburn property would you say they were definitely antiquated?

Mr. Stout: Objected to.

The Court: Objection sustained.

[fol. 167] Q. Will you describe the age of the fixtures you found in the Colburn property?

A. My impression of them as I viewed them would be that they were a minimum of five years and a maximum of seven or eight. They were in good condition, not unlike the kind of fixtures we are installing now in our renovation homes.

Mr. Stout: I move to strike out the answer on the ground the witness does not know the age of them by looking at them.

The Court: I will let it stand for what it is worth.

Mr. Stout: I ask an exception.

Mr. Meyner: Cross examine.

Mr. Stout: No cross examination.

Mr. Meyner: The Relators rest.

MATTHEW BERCAW sworn for the respondent.

Direct examination.

By Mr. Stout:

Q. Mr. Bereaw, what is your business?

A. I am Tax Assessor of the Town of Phillipsburg.

Q. How long have you been Tax Assessor of the Town Phillipsburg?

A. Eight years.

Q. Do you make a complete assessment of all of the lands and buildings in Phillipsburg each year?

A. Yes.

Q. How do you make that assessment? What do you do? Do you visit the property?

Mr. Meyner: If your Honor please, it seems to me that I would be entitled to know what the purpose of this line of questioning is. If it is to show that the assessment has [Vol. 168] been reduced or raised or anything like that it has no standing in this particular case, because it is well settled in the case of Francisco v. State Department of Institutions and Agencies, 13 Miscellaneous Reports 663, that an assessment is not evidence of depreciation in value or increase in value in an inquiry where the value is in question.

The Court: Let me see the case.

Mr. Meyner: It is 13 Miscellaneous Reports and 22 Corpus Juris.

Mr. Stout: I am not going to ask whether there has been depreciation in value or an increase in value, but what he knows about the property and the assessment he has placed upon it.

The Court (examining case): What page is this on?

Mr. Meyner: It starts right here. It starts at 671 and runs over to 672.

The Court: Go ahead.

(After argument.)

The Court: It seems to me the value placed upon a property by an assessor is at least some evidence of the value. Under the law he is presumed to assess it at its true value, which presupposes that he has knowledge of the value.

(After discussion.)

The Court: I will allow it and you may have an exception.

(Last question read.)

A. Yes, I visit pretty nearly every house in town during the course of the assessment period.

Q. And that is between October 1st and January 10th of each year, is it not?

A. That is right.

[fol. 169] Q. So, for 1930—that is when you first became Assessor?

A. Yes, sir.

Q. Did you assess this Colburn property as of October 1, 1930?

A. Yes. It was carried the same as it was the preceding year.

Q. You did assess it as of October 1, 1930?

A. That is right.

Q. And you also assessed it as of October 1, 1931?

A. That is right.

Q. And October 1, 1932?

A. Yes.

Q. And October 1, 1933?

A. Yes.

Q. And October 1, 1934?

A. Yes.

Q. And October 1, 1935?

A. Yes.

Q. And October 1, 1936?

A. Yes.

Q. And October 1, 1937?

A. Yes, sir.

Q. In your opinion, as an assessor, in valuing property, is property in some sections of Phillipsburg assessed at a higher rate of true value than in other sections?

A. Yes, sir.

Q. How is this section in which the Colburn property is situated or located? What relation does the assessment in your opinion bear to the value of the property?

A. What was that again?

(Last question read.)

Q. I will withdraw the question and put it in another way. Take the location of the Colburn property, what is the relative assessment of property in that locality as compared with the true value?

Mr. Meyner: I object.

The Court: I will allow it.

A. About 50%.

Q. In other words, the assessment of property in that locality, that you put upon it, is about 50% of its true value?

A. That is right.

[fol. 170] Q. Then what was the assessment that you put upon the property as of October 1, 1935?

Mr. Meyner: May I have a general exception?

The Court: All right.

Mr. Meyner: I object and ask an exception.

The Court: Yes.

Q. October 1, 1935, what assessment did you have on the Colburn property?

A. Five hundred on the land, sixteen hundred on the improvements.

Q. In other words, the total assessment was \$2100?

A. That is right.

The Court: Is that for the half of the house which is owned by Colburn, or the whole building?

The Witness: The part owned by Colburn, 99 North Main Street.

Q. What was the assessment that you put upon the property as of October 1, 1934?

Mr. Meyner: May I have a general exception to all this?

The Court: You may.

A. \$750, land; \$1700, improvements.

Q. In other words, a total valuation of \$2250?

A. \$2450.

Q. \$2450, rather?

A. Yes.

Q. So there was a reduction in the assessment as of October 1, 1935 to \$500 on the land and \$1750 on the buildings?

A. \$1600 on the buildings.

Q. Why that reduction?

[fol. 171] A. Well, the County Board and I agreed at a meeting to reduce certain sections of the town that we thought were assessed too high, the section behind the railroad, this North Main Street section, and Mercer Street.

Q. What assessment did you put upon the Colburn property as of October 1, 1936?

A. \$500 for the land and \$1400 for the building and \$200 for the garage; \$1600 for the improvements.

Q. The same assessment that you put on October 1, 1935?

A. That is right.

Q. What valuation or assessment did you put upon the property as of October 1, 1936?

A. The same as 1935.

Q. As of October 1, 1937?

A. \$500, land and \$1600, improvements.

Q. The same as for 1935?

A. That is right.

Q. So that in your opinion, knowing the value of this land over a period of eight years, this property was just as valuable on October 1, 1937 as it was on October 1, 1935?

Mr. Meyner: I object.

The Court: Objection sustained. He has made an objection to the question.

Mr. Stout: What is the objection to the question?

Mr. Meyner: If your Honor please, I contend that he is here to testify to assessments. He is not a real estate expert. The inference that you are trying to create—

The Court: It is really a summation, any way. Senator, is it not? Of what he has testified to?

Mr. Stout: Well, it is only to bring it out clearly to the jury. I had him testify first as to the assessment of the property on October 1, 1935, and the assessment of the property on October 1, 1937, that being subsequent to the [fol. 172] building of the embankment, and October 1, 1935 being prior to the building of the embankment. Then I asked him in his opinion as the Assessor valuing property which he said he valued at 50% of the true valuation, I asked him in his opinion was there any difference in value between October 1, 1935, when he put the same assessment on, and on October 1, 1937; whether there was any change in value. I think that is permissible.

The Court: That is a summary of what he said before.

Mr. Stout: I am now asking about value. The other was about the assessment. I am not asking about assessment. I am asking about value, and under the cases the opinion of the Assessor as to the value of land is always evidential. How could he say that he assessed the property at 50% of its value unless he knew its value?

The Court: The answer to that question is obvious, because if he put the same assessment on it in 1937 as he did in 1935, he must have, of necessity, been of the opinion that it was worth the same value. Isn't that so?

Mr. Stout: No. The Assessor might have determined that a property was worth \$4400 in 1935 and put an assessment on it of one-half of that amount. He might determine the value of the property in 1937 to be \$3,000 and put the same assessment upon it. Therefore I think it is proper to ask the witness, when he determined his assessment for 1935, if he took into consideration the same value as he did when he assessed it as of October 1, 1937.

[fol. 173] The Court: Go ahead. Did you—the same value?

The Witness: Yes. I thought it was worth just as much in 1937 as it was in 1935.

Mr. Stout: That is all.

Cross-examination.

By Mr. Meyner:

Q. Mr. Bercaw, did you take an oath of office when you started your job?

A. I probably did.

Q. You do not know?

A. It has been a long time ago, eight years.

Mr. Stout: May it please the Court, it does not make any difference whether he took an oath of office or not. Under the law he is required to assess property at true value.

The Court: Do you object to the question?

Mr. Stout: No, I do not object. I do not see the materiality of it.

The Court: I suppose it is cross-examination.

Mr. Stout: All right.

Q. Do you know the law to be that you are supposed to assess at true value?

A. Sure, I do.

Q. But you did not assess at true value?

A. No.

Q. When does your assessment period start?

A. October first.

Q. And you walk out in the neighborhood from house to house with your book?

A. Yes, sir.

Q. When do you complete your job?

A. Around Christmas time.

Q. When did you complete your job in 1937?

A. I cannot tell you the exact date.

[fol. 174] Q. Around Christmas time?

A. Probably that.

Q. And you started about October first?

A. That is right.

Q. Do you know how many working days you have?

A. I never counted them.

Q. Did you work on Saturday in making your assessments?

A. Sometimes.

Q. What are your hours?

A. During my assessing period my hours can be anywhere from 8:30 in the morning until midnight.

Q. Are they?

A. Sometimes they are.

Q. How often?

A. Quite often. Last night it was three o'clock in the morning I was still writing tax bills as part of my job.

Q. In your home?

A. Certainly.

Q. Are you supposed to be doing that now?

A. Yes, sir.

Q. You were working last night until three o'clock?

A. Yes, sir.

Q. Copying them from one book to another?

A. Yes, sir.

Q. That is the assessment you give?

A. Part of it was part of my job.

Q. So you do not go into every house?

A. I do not.

Q. And you do not know whether you were in the Colburn house?

A. I know I was not.

Q. Do you view the houses from the outside?

A. Not always, no.

Q. You were not in the Colburn house in 1937?

A. No.

Q. You do not know whether the embankment affected the living conditions in there, do you?

A. I certainly do not.

Q. When you go into a house—How often do you go into a house during an assessment?

A. That all depends.

[fol. 175] Q. About how many houses do you have to assess from October first to around Christnas time?

A. If I had to assess every house in Phillipsburg during that period it would take ten men to do it.

Q. In your opinion would a house with two baths be more valuable than a house with one bath?

A. Certainly.

Q. Do you show that up?

A. I never show anything except that if is a house with a garage, and the size of the lot.

Q. Then you cannot notice the difference if you do not go into houses, do you?

A. Certainly not.

Q. So that you have to do it roughly?

A. Roughly is right.

Q. So that you may have just copied the Colburn's assessment from 1935 to 1937?

A. No. It was changed for some reason.

Q. What was the reason?

A. The reason was that the houses in that vicinity and the conditions in that vicinity had been changed quite a lot.

Q. Of was it because you agreed with the Tax Board?

A. The Tax Board has to agree with me. If they don't like agreeing with me they tell me about it.

Q. And if you do not like agreeing with them you tell them about it?

A. That is right.

Q. So you did not, in 1937, make a meticulous and careful survey of the Colburn property?

A. I do not remember.

Mr. Meyner: That is all.

Redirect examination.

By Mr. Stout:

Q. You certainly did know the embankment or approach to the bridge was there on October 1, 1937, did you not?

A. Well, I knew it looked pretty good then.

[fol. 176] Q. You knew it was there?

A. Yes, sir.

Q. In assessing property do you keep a list of the sales of property in the Town of Phillipsburg?

A. No.

Q. You do not keep a record of it?

A. No. There isn't a sale of a property in town that amounts to anything, that means a thing.

Q. Are you familiar with the sales of property of the building and loan association of Phillipsburg to Rose Bachman?

A. I received an abstract of the transfer, yes, sir. It is a copy of an abstract from Belvidere. The County Clerk's office sends to the Assessor's office a copy of each and every transfer of property.

Q. So then your office does get a memorandum or record of every transfer of property?

A. Yes.

Q. Does that show the selling price?

A. Not always.

Q. It does not?

A. No, sir.

Q. Did you know what this property of the building loan association to Bachman was?

A. Well, it was testified to yesterday—

Q. No, other than that.

A. Yes, it was \$1700.

Q. How do you know that?

A. That was on the abstract that came into the office.

Q. Was there a mortgage on this property previously owned by the building and loan association?

Mr. Meyner: I object, your Honor. The books are downstairs and they can be put in evidence. This is hearsay.

Mr. Stout: In the administration of his office as Assessor he gets this information.

Mr. Meyner: I object to the question.

The Court: I think we are going pretty far.

[fol. 177] Mr. Stout: I just wanted to show the Court it was not a real sale. That is all.

Recross-examination.

By Mr. Meyner:

Q. Would you say true value represents what a willing purchaser would pay to a willing seller?

A. No.

Q. Would you say that true value is what a willing buyer would pay to a willing seller?

A. No.

Q. What, in your opinion, is true value?

A. True value is what property would be worth, figuring depreciation, after replacement.

Q. Then you believe true value to be reconstruction cost?

A. I believe that has a lot to do with it.

Q. Have you valued the Colburn property on reconstruction cost?

A. Yes, sir.

Q. What is the depreciation?

A. No one knows. It is just what your guess is—as good as mine.

Q. You valued it on reconstruction cost, did you?

A. Yes, sir.

Q. What did it consist of?

A. Do you mean the number of rooms in the house?

Q. Let us have the dimensions of the house.

A. I just don't have my records right here.

Q. Approximately?

A. The dimensions of the house?

Q. Yes.

A. About 23 feet by 50 feet.

Q. How many rooms downstairs?

A. I do not have any records here of anything like that.

Q. You do not have any records at all, do you?

A. No.

Q. Then what do you mean by saying you do not have them here?

A. We don't keep records of anything like that.

Q. What would be the reproduction cost of a frame prop- [fol. 178] erty 23 by 50?

A. It all depends on what you would have in it.

Q. You were not in it?

A. No, I was not.

Mr. Meyner: That is all.

JOHN H. PURSEL, sworn for the respondent.

Direct examination.

By Mr. Ockford:

Q. Mr. Pursel, what is your connection with the Bridge Commission?

A. I am its attorney in New Jersey.

Q. How long have you been the attorney for the Bridge Commission?

A. Since about May, 1936, probably a little earlier than that; I will say January, 1936.

Q. What, if anything, did you have to do on behalf of the Commission in acquiring the property upon which the bridge and its approaches were constructed?

A. Well, as I recall it, there were 41 properties and I searched 20 of them myself, sixty years back, prepared abstracts and signed them as a counsellor at law. And Senator Prall, of Hunterdon County, who is now Judge Prall, was associated with me and he searched the remaining properties, and I drew up the contracts of sale, all the closings were made in my office. As Judge Prall made searches and found encumbrances or flaws in the title I cured those flaws by some means, and every one of his abstracts were submitted to me for approval and I checked them and I came to the County Clerk's office on each one of his searches and checked it up, and then when the title was closed in my office I drew the papers up which were to be recorded, and the [fol. 179] mortgages for cancellation, whatever they happened to be, and I took a last look at the records to be sure that everything was all right.

Q. You examined, then, each title to each parcel acquired by the Bridge Commission?

A. I did.

Q. And you are familiar with the titles of record of all those properties?

A. I am.

Q. You have abstracts of all of them, I take it?

A. I have.

Q. Now, in any case did the Bridge Commission condemn property it had acquired in Phillipsburg in connection with building the bridge or the approach?

A. They did not—

Mr. Meyner: If your Honor please, I believe that is admitted by the pleadings. I do not deny such an allegation.

The Court: He has answered it anyway. He says they did not.

Q. In each instance how was the title acquired?

A. By negotiation with the owner by Mr. Pierson the secretary, and sometimes with the help of Mr. Wilson, the

local engineer of the Commission, and sometimes with my help if they thought they needed me in.

Q. Was there a written contract of sale in each case?

A. There was.

Q. And then there was a deed of conveyance in each case?

A. There was.

Q. Will you tell us briefly what steps were taken in vacating streets or portions of streets in the path of the bridge?

Mr. Meyner: If your Honor please, I admit in the pleadings [fol. 180] that they acquired neighboring properties and the streets, in turn, were vacated by the Town of Phillipsburg, and the property went to the

The Court: I do not think there is any dispute about that, is there?

Mr. Ockford: Except we allege the question of time is important. If counsel concedes the properties were acquired prior to the vacation of the streets and that the title reverted to the abutting owners, that is all.

There is one allegation in the return that you leave us to our proof as to whether the acquisition was prior to the vacation of the streets.

The Court: Well, all right. Ask it.

Q. The fact is you acquired the titles and then the town vacated the streets and you, as the abutting owner, acquired the title by reversion to you?

A. That is correct.

Q. How were those streets vacated or closed?

A. By the town. The town was represented by Sylvester C. Smith, the Town Attorney. Together, we drew up the ordinances and they were vacated by ordinances of the Town, published in the newspaper and with notice to the abutting owners.

Q. In connection with acquiring the parcels of land, how did it compare with the construction progress of the bridge? Was it all done before any construction or after or during or how?

A. Well, it was during construction. The first thing that was necessary to do in order to build the bridge, was to get the money, and that was done by a prior bond issue and this money was deposited in one of the Trenton banks.

[fol. 181] Mr. Meyner: If your Honor please, I cannot see how that is important in this case.

Mr. Ockford: It has a bearing in connection with whether the—The jury is entitled to know how these sales were made.

The Court: Go ahead.

Q. Just tell us briefly how the acquisition of the land coincided with the construction work.

A. The trust indenture provided that a two million and a half fund—the trust indenture provided that interest should be paid out of principal. That caused the Commission to act as rapidly as possible, because they could not pay interest out of earnings until the bridge was built. Then the contract was let for building piers and abutments. That was the first contract, and that contract provided a penalty of \$300 a day—

The Court: In other words, you wanted to act quickly so you went in and agreed with the property owners quicker than you would ordinarily?

The Witness: Yes, sir.

The Court. That is the answer.

Mr. Ockford: That is all we want to know.

Q. Then, directing your attention to Exhibit P-3, I call your attention particularly to the land adjoining the Colburn property to the rear, upon which the name "Leidy" appears. Was that tract called "Leidy" acquired in one title?

A. Yes, sir.

Q. You examined that title for six years back?

A. Yes, sir.

Q. Is there any easement shown with respect to the Colburn property over or against the Leidy property?

A. There is not.

Mr. Ockford: That is all.

[fol. 182] WILLIAM H. WILSON sworn for the respondent.

Direct examination.

By Mr. Ockford:

Q. Mr. Wilson, what is your connection with the Bridge Commission?

A. Resident engineer.

Q. For how long have you been acting in that capacity?

A. I have been with the Commission as their engineer for the past fifteen years.

Q. Did you have charge of the building of the bridge in question here?

A. Yes, sir.

Q. Prior to any construction work whatsoever, did you examine the properties which later were acquired by the Bridge Commission, upon which the bridge was built?

A. Yes, sir.

Q. To what extent did you examine them as to size and condition and so on? Just tell us what you did.

A. Well, the industrial buildings we measured up in detail and prepared plans for them so they could be appraised properly by the builders and ourselves.

Q. Did you do that with respect to each piece of property?

A. That is the industrial buildings.

Q. Did you prepare this map, Exhibit P-5?

A. No, I did not.

Q. Was it done under your direction?

A. No, that was done in Trenton.

Q. Have you checked it? Do you know whether it is correct?

A. It is correct. It represents the situation.

Q. Prior to the building?

A. Yes, sir.

Q. And Exhibit P-8 represents the conditions when?

A. After the construction of the bridge.

Q. I call your attention first to the Leidy property, to the rear of the Colburn property, a silk mill brick building. Will you tell us the height of that building?

A. The extreme height, with the ventilator on top of the building, was about 22 feet above the ground.

[fol. 183] Q. Is the Leidy property higher or lower than the Colburn property, at the surface of the ground?

A. The ground, you mean?

Q. Yes, the ground level?

A. I would say that the Leidy property is probably a foot and a half to two feet higher than the Colburn property.

Q. Did you check the elevations of these properties and the buildings?

A. Yes, sir.

Q. Did you take photographs of the buildings?

A. Yes, sir.

Q. Now this first building you are talking about—I show you a picture and ask you if that fairly represents a picture of the building shown on this map, Exhibit P-5, and if so, which one?

A. That is it. That is the main Leidy property.

Q. The one you say is 28 feet high?

A. No. That is this building here (indicating).

Q. How high is that building?

A. That is about 44 feet from the ground.

Mr. Ockford: I offer that picture in evidence.

Mr. Meyner: Will you identify the building?

The Witness: That is this building here (indicating), along Second Street.

Mr. Meyner: On the other side of Broad Street?

The Witness: Yes.

(Photograph referred to and offered in evidence is marked Exhibit R-1.)

Q. That is directly in line with the rear of the Colburn property, is it not—you can see it?

A. You can see it from the Colburn property.

Q. You could not look over it, could you?

A. No, sir.

[fol. 184] Q. Now I show you a picture and ask you if that represents one of the buildings on the Leidy property, and if so, tell us which one?

A. That represents the boiler room in what is known as the pocketbook factory. That is this building here and this building here (indicating).

Q. What is the height of that building?

A. That building is 24 feet above the ground line, as I recall. That is, the pocketbook factory itself.

Mr. Ockford: I offer that picture in evidence.

(Photograph referred to and offered in evidence is marked Exhibit R-2.)

Mr. Meyner: That is the pocketbook factory, is it?

Mr. Ockford: Yes.

Q. I show you another picture and ask you if that fairly represents what this Leidy property looked like prior to any construction?

A. That picture represents the boiler room in connection with the pocketbook factory.

Mr. Ockford: I offer it in evidence.

(Photograph referred to and offered in evidence is marked Exhibit R-3.)

Q. What, if any, construction was there at that time between the property fronting on North Main Street, including the Colburn property, and the Leidy property? What was there, if anything?

A. In the way of buildings?

Q. Any kind of a structure?

A. Directly in behind the Colburn property was a garage, [fol. 185], and south of the Colburn property was a solid board fence, between the Leidy property and the houses along North Main Street. In addition to those two there was a concrete wall separating the Leidy property from the property along North Main Street.

Q. How high was the board fence?

A. I would judge about 8 feet.

Q. I call your attention to a building marked on Exhibit P-5 as the meat packing plant, and ask you if this photograph is a fair representation of how that looked at the time?

A. It is. That is the building on First Street.

Q. Was it in use at the time?

A. No, sir.

Q. How high was the highest point on that building?

A. Thirty-eight and one-half feet, as I recall, above the ground.

Q. And was that ground higher or lower than Colburn's?

A. Higher.

Mr. Ockford: I offer this picture in evidence.

(Photograph referred to and offered in evidence is marked Exhibit R-4.)

Q. These pictures were all taken prior to any work on the bridge?

A. That is correct.

Q. Immediately prior?

A. That is correct.

Q. I call your attention on this picture to, on the Leidy property, a building marked "Barn and Sheds", and ask you if that is a view of those?

A. That is the building, taken from Second Street, this corner here (indicating).

Q. Could that be seen from the Colburn property?

A. The top of it, yes.

Q. And that is the way it looked?

A. Yes, sir.

Mr. Ockford: I offer it in evidence.

[fol. 186] (Photograph referred to and offered in evidence is marked Exhibit R-5.)

Q. Now, prior to any construction work how did Howell Avenue compare with North Main Street?

Mr. Meyner: If your Honor please, it would seem to me that that is really calling for a conclusion. He could very well testify as to how Howell Avenue looked.

Mr. Ockford: He is an engineer.

The Court: Yes. Go ahead.

A: Howell Avenue was an unpaved street and merely covered that section. In fact it was really an ordained street in the Town of Phillipsburg. North Main Street was a paved street, paved partially with amiesite and partially with paving bricks.

Q. And North Main Street connects what places?

A. North Main Street connects the central part of Phillipsburg, Union Square, with the northern part of Phillipsburg.

Q. Where does it run to? If you go out North Main Street, where do you go?

A. To Meadow Avenue, and you have a connection there with Route 34, going toward Washington.

Q. It is a main thoroughfare?

A. Yes, sir.

Q. How did Broad Street compare with North Main Street?

A. Well, the paving on Broad Street was not as good as on North Main Street, but still better than on Howell Avenue, and the outlets to Broad Street were secondary to the outlets to North Main Street. It led to just one section of the town.

Q. In other words, Broad Street was just a local street and North Main Street was a main thoroughfare?

A. Yes, sir.

[fol. 187] Q. What was the physical condition of these alleys in here, Skillman Alley and Plotts Alley and Chitewink Alley?

A. None of them were paved.

Q. And were the houses closely placed together there?

A. Closely placed together, yes.

Q. This baseball field here had a wall around it?

A. Yes, sir.

Q. How high?

A. I would say offhand it was 12 or 15 feet high.

Q. Did you make any actual observation or any checking up when that was shown on these maps?

A. Well, it was done under my supervision.

Q. And does that accurately show it?

A. I believe it does.

Q. What, if any, shadow is cast upon the Colburn property from structures or buildings to the north?

A. None that I know of.

Q. Do you know of any that comes from the sunlight?

A. No, I do not.

Q. Since the time the bridge was built, at any time of the day when the sun shines is there a shadow thrown from the embankment over on the Colburn property?

A. Not that I know of.

The Court: Well, do you know? Have you been there?

The Witness: Well, surely.

Q. The fact is what?

A. The fact is when the sun sets I do not see how it could throw a shadow on the Colburn property.

The Court: Well, does it?

The Witness: No.

The Court: Then say so.

Q. I notice on Exhibit P-8 a profile sketch of the embankment.

A. Yes, sir.

[fol. 188] Q. Can you tell us about the base of the embankment, or the face of the embankment, how far that is from the rear lot line of the Colburn property?

A. Twenty feet. The foot of the slope is 20 feet from the Colburn property.

Q. Is that nearer or farther away from the rear line than the rear of the brick wall was prior to the construction of it?

A. It was twice as far.

Q. And the top of the embankment is how far away?

A. At that point, 50 feet.

Q. Did you make any observation with respect to the quantity of light and air afforded to the Colburn property before and after construction?

A. Only by observation.

Q. What was the situation prior to the demolishing of the buildings, and what is it since the building of the embankment?

A. Well, a cross section taken from directly in back of the Colburn property up to the top of our embankment now will show more airway than it would if the cross section had been taken between the Colburn property and the Leidy silk mill.

Q. In other words, there is more air than there was before?

A. Yes, I would say so.

Q. How about light?

A. Well, that would follow in the same way.

Q. Have you made any observation with respect to the conditions since the building of the embankment, as to the circulation of air with respect to this Colburn property? Is there anything there that would interfere any more or less than prior to the building of the embankment?

A. Nothing, no. The area is greater now than it was before. I would say the unobstructed area behind the Colburn property is larger today than it was prior to the time we built the embankment, and, therefore, in my opinion the circulation would be greater.

[fol. 189] Q. In other words, there is more air and more room for it to circulate freely?

A. Yes, sir.

Q. There is no question about that in your opinion as an engineer?

A. Yes, sir.

Q. Did you check the elevations of the Colburn property and the adjoining property and put the elevations on a map?

A. Yes, sir.

Q. (Showing witness paper.) Just take the Colburn property and tell us briefly how these elevations now compare with the elevations prior?

A. As far as the Colburn property goes, the ground and elevation of their entire property is the same as prior.

Q. Just give them briefly.

A. The elevation of the sidewalk in front of the Colburn property as it is today, in our figures, is 196.7.

Q. Just what does that mean?

A. It is 196.7 feet above Sandy Hook mean high tide.

Q. The sea level?

A. Yes, sir.

Q. Go ahead. What are the other elevations on the Colburn property?

A. By estimating from the height of the floors of the different buildings on the Colburn property—

Q. Tell us the highest point where you can see anything.

A. I show the elevation here on the second floor of the building as 206.7 feet above Sandy Hook.

Q. What was the elevation of the factory building immediately behind prior to any bridge construction?

A. The low peak of the roof, not considering the ventilators, was 214.25 feet. In other words, the peak of the roof was 18 feet higher than the second story window in the Colburn property.

Q. A man of ordinary height, looking out of the window of the Colburn property— What would he see?

A. He could not see anything more than the peak of the roof.

Q. Now, looking over toward this Shimer meat packing [fol. 190] house, compare those elevations.

A. Well, the elevation there would be the peak of that roof, which was 216 feet, which was 10 feet higher than the second floor of the Colburn property. The small shed on this end, right on the property line, was 216½ feet.

Q. Now, from the Colburn property, prior to the bridge construction, could you see the railroad tracks from that point? Could you look through those buildings?

A. Well, I do not know. I do not know how they could, with the fence that was on the property. There may have been, by looking around the corner of the building or something else, a slight possibility of getting a slight view of it; I do not know.

Q. Well, beyond those buildings were the railroad tracks?

A. Yes, sir.

Q. And beyond that the works of the American Horseshoe Company?

A. Yes, sir.

Q. And beyond that is the Delaware River?

A. That is right.

Q. Prior to the bridge construction was there any point in the Colburn property, even up to the second floor, where a person standing there could look out and see the banks of the Delaware River?

A. I doubt it. They could see the foot of College Hill over in Easton, the embankment there.

Q. About what elevation above the river would be the first line of vision of that hill?

A. Do you mean the water surface level?

Q. Yes, as to whether it was a quarter or half or what?

A. I would say 35 feet.

Q. In other words, you could see the top of the hill?

A. The ground that they could see would be about 35 feet above normal water in the Delaware River.

[fol. 191] Q. And today, looking over the embankment from the Colburn property, can you still see College Hill?

A. Yes, sir.

Q. What did the Bridge Commission do after it acquired this property with all these buildings?

A. They were torn down and demolished.

Q. And in place of them you have built this embankment to the point shown on Exhibit P-8?

A. That is right.

Q. What did you build, if anything, on the property where the Shimer Meat Packing house stood?

A. We have part of our embankment there.

Q. And beyond that, what is there?

A. That is an open viaduct.

Q. Standing on the Colburn property today, in the rear of the lot, and looking almost to the west, what can you see now that you could not see before?

A. Parts of Easton, along Front Street on the other side of the river, you can see now, that you could not see before.

Q. In other words, this space has been left open?

A. Yes, sir. We have widened the grass plot over by the silk mill. It is an open space.

Q. This street shown on Exhibit P-5, First Street, prior to that change here, how far did that run?

A. That was an ordained street of 20 feet west of the property.

Q. At that point what happened to the street?

A. Well there was a continuation. The horseshoe company and the silk mill used it to get around their buildings.

Q. To what extent was it an open street before the change?

A. Just 20 feet.

Q. And after that you went on private property?

A. I believe so, yes, sir.

Q. Now, at the present time it ends just before reaching Broad Street, does it not?

A. That is right.

[fol. 192] Q. Now, going to this beach here prior to and since, is there any difference in the distance that you have to travel? Prior to this improvement you had to come up here and over a private right of way, and now you have to come over this way (indicating), down this way and is there any difference in the walking or driving?

A. Oh, yes.

Q. What is the difference one way or the other?

A. Going down North Main Street you drive around there instead of going through the silk mill private property, which is probably three to four hundred feet longer; and walking, as they did prior to constructing the bridge, it is the same distance to go through, up and down the road, as it was before.

Q. What, if anything, has been done to this road here?

A. Well, the Pennsylvania Railroad deeded over to the Town of Phillipsburg together with the Bridge Commission, a tract of land 30 feet wide and it was paved and turned over to the Town of Phillipsburg.

Q. From the standpoint of accessibility how does that compare now with prior?

A. As far as going over the private land, there is more accessibility to it now than there was before.

Q. Was this private road indicated by anything to show it was a private road?

A. Well, not to my knowledge, no.

Q. Prior to the improvement Second Street ran from what point to what point?

A. From North Main Street to the railroad property?

Q. And it ended there? Now the baseball park is gone?

A. Yes, sir.

Q. And these factories are gone?

A. Yes, sir.

Q. So, today, if that street were there no one could use it to get anywhere, could they?

A. No.

Q. And it remains open to Howell Street?

A. Yes, sir.

[fol. 193] Q. Broad Street is relocated?

A. Yes, sir.

Q. What else was done to it?

A. It was paved with concrete and widened to a four-lane highway at the present time.

Q. And it shows on this map?

A. Yes, sir.

Q. And the alleys there—there is no longer anything there to go to, is that right?

A. No, sir.

Q. And up here you have a wide bridge plaza, is that correct?

A. Yes, sir.

Q. Now, to make plainer or clearer the conditions prior and subsequent, did you construct or supervise the construction of a model?

A. Yes, sir.

Q. Just tell us briefly what that model shows.

A. The model shows the condition of the property prior to the time of the demolishing of any of the property. It also shows the condition of the property as it is now, showing the condition of the houses along North Main Street.

Q. Is that made to scale?

A. Yes, sir.

Q. And made from photographs and measurements of the engineers?

A. Yes, sir.

Q. Does that fairly represent the location of the several buildings with relation one to the other?

A. Yes, sir.

Q. Will you produce it?

Mr. Ockford: The model is quite large, and I think if we could have a table or something here—I do not know whether it is convenient.

(Model referred to is placed before the jury.)

Q. Mr. Wilson, the model on the table is the model you told us about?

A. Yes, sir.

Q. Made to scale?

A. Yes, sir.

Q. Will you just come down here and indicate the Colburn [fol. 194] property on this model? This is previous to the building of the bridge, is it not?

A. Yes, sir.

Q. This is before any bridge construction work was undertaken, that is, east of the railroad?

A. Yes, sir. The Colburn property is this half of the double dwelling here (indicating).

Q. It faces what street?

A. North Main Street.

Q. And its outlook is what?

A. Across North Main Street and the hillside going up.

Q. Does the model show the grade of the hill?

A. It represents a true picture taken from a contour which was taken in the field.

Q. Now, in the rear of the Colburn property is the garage that is shown on the model?

A. Yes, sir.

Q. A person standing in the rear of the Colburn property, looking directly in front of them, would see what building?

A. They would see the silk mill connected with the Leidy property.

Q. Is the top of that higher or lower than the top of the embankment?

A. That is, as I recall it's about 2 feet lower at this particular point than the top of the embankment at the same point.

Q. Now, this Shimer Meat Packing house is in back of this building?

A. Yes, sir.

Q. Is the top of that higher or lower than the top of the embankment?

A. Somewhat higher, I should judge about 8 feet.

Q. And this building (indicating) is what?

A. That is the Leidy storehouse, and that is higher.

Q. Now, a person standing on the Colburn property, on the ground, could not look over this garage, could he?

Mr. Meyner: If your Honor please, it seems to me we are getting into a very obvious question. The exhibit is there.

[fol. 195] By the Court:

Q. Well, did you stand on it and look yourself?

A. On this particular piece of property, the Colburn property?

Q. Yes.

A. Oh, yes, I have been down there. I have been there personally.

Q: You may testify.

A. No, you could not see it.

By Mr. Ockford:

Q. Looking in the general direction of west or southwest, indicate what you could see normally from the Colburn property.

• A. Do you mean from down in the yard?

Q. Yes.

A. Down there you would see the garage and this board fence in there.

Q. And from the first floor?

A. I do not know. I have never looked at that but I judge—

Mr. Meyner: I object.

Q. All right. Can you show us something on here approximately the size of a normal man? How high is this garage?

A. Well, I would say it is 15 feet high, probably.

Q. Is there any point that you see on there, as an engineer, where a person could look and see the bank of the river?

Mr. Meyner: I object. He was not there. There is no use saying that he was standing there.

(Last question read.)

Mr. Meyner: I do not know as he could see better than anybody else.

The Court: Were you there and did you look?

[fol. 196] The Witness: No, not to directly answer the question.

The Court: All right.

Q. Now will you show how it looks since the construction?

The Court: Are you going to offer that in evidence?

Mr. Oakford: No, not as an exhibit, only as an aid to understand the testimony.

Mr. Meyner: Then I ask that it be excluded immediately.

Mr. Oakford: If you take that position I will offer it then.

The Court: Do you not think it would be very helpful?

Mr. Oakford: Yes, I will offer it.

The Court: It may be marked.

(Model referred to and offered in evidence is marked Exhibit R-6.)

(Another model is placed before the jury.)

Q. Is that in the right position now?

A. Yes, sir.

Q. What does it fairly represent?

A. It represents the true condition of the ground as it is today.

Mr. Oakford: I will offer it in evidence as a separate exhibit and have it marked as a separate exhibit, showing the condition afterward.

(Model referred to and offered in evidence is marked Exhibit R-7.)

[fol. 197] Q. This section in here, west of the end of the abutment, is now laid out into what?

A. A park and grass plot.

Q. Any shrubbery or anything?

A. Yes, sir.

Q. In place of the 8 foot board fence you told us about, what is there now along the rear line of the property?

A. Well, there is a wall there—there has always been a wall there between this property here and the Leidy property. Now we have raised that wall up and built a new wall on top of the old one.

Q. There is a concrete retaining wall?

A. Yes, sir.

Q. How high is it?

A. Two and a half feet above this ground right here (indicating).

Q. And then this space between the wall and the base of the slope at its narrowest point is what?

A. Sixteen feet.

Q. And Second Street is accessible, and what street?

A. Howell Avenue.

Q. Did the bridge construction touch Howell Avenue at all?

A. No, it did not.

Q. What, if any, improvement has been made in Howell Avenue?

A. After the construction of the bridge we graded Howell Avenue and the Town of Phillipsburg came in later and has repaved it with tar and stone.

Q. Is this the circular piece where Broad Street connected into the North Main Street part of the Bridge Commission property?

A. Yes, sir.

Q. Is that used for any purpose; or what is done with it?

A. Well, this is a parkway, and this is roadway (indicating).

Q. And it is open as a parkway?

A. Yes, sir.

Q. I want you to identify three more pictures. (Showing witness photograph.) What does that picture represent?

A. That was the board fence at the rear of these properties here.

[fol. 198] Q. Was it in the line of vision from the Colburn property, looking toward Pennsylvania?

A. I would say so.

Q. That is the board fence you testified about?

A. Yes, sir.

Mr. Ockford: I offer it in evidence.

Mr. Meyner: Was this during construction?

Mr. Ockford: That was before it was torn down.

Q. Is that the fence before you touched it?

A. Yes, sir.

Mr. Meyner: I still object on the ground that it shows—

The Court: What is the purpose of the offer?

Mr. Ockford: It is merely to show the view of the Colburns prior to any work being done, looking out in the same direction.

The Court: What is the objection?

Mr. Meyner: I do not know whether those photographs—whether those planks were not put up against the fence line while they were constructing the thing. That is during construction.

The Court: Objection sustained.

Q. I show you a picture and ask you what building that represents prior to the bridge construction?

A. That represented the silk mill on the Leidy property.

Q. And that is which building?

A. That is the building over in here (indicating on map).

Q. While you are there will you identify that picture [fol. 199] (indicating) as what part of the Leidy property?

A. That is the garage in the back of the property there visible from the rear of the Colburn property.

Mr. Ockford: I offer those two in evidence.

(Photographs referred to and offered in evidence are marked respectively, Exhibit R-8 and Exhibit R-9.)

Q. Mr. Wilson, can you give us the date of the completion of construction?

A. I would say the first of January. That is, the greater part of it was completed, but as far as our entire contracts go they were not completed until about the first of July this year. We opened the bridge to operation on the 17th of January.

Q. When did you start building the embankment?

A. Between the middle of May and the first of June.

Q. What year?

A. 1937.

Q. When was the embankment part completed, that is in the rear of the Colburn property?

A. On July 15th, or in that neighborhood.

Q. When was the bridge construction first started at any point?

A. We broke ground on the New Jersey side on the 19th of August, 1936.

Mr. Ockford: That is all.

Mr. Meyner; I wonder if it would be possible to have the before and after model a little more prominent?

The Court: Before and after what?

Mr. Meyner: The sections before and after construction. Here is the after section (indicating), and this (indicating) is the section before.

[Foot 200] The Court: What you want is to have the first part of the exhibit shown again. Is that it?

Mr. Meyner: If it could be laid alongside of it so that we could see the relation.

Cross-examination.

By Mr. Meyner:

Q. Now, Mr. Wilson, you are the resident engineer on this job?

A. That is right.

Q. And you are very proud of your job, are you not?

A. I should think so.

Q. You take a good deal of pride in building this bridge?

A. That is true.

Q. And in having the grading done and seeing that everything was performed to the best of your ability?

A. That is right.

Q. What scale is this model?

A. One inch equals 30 feet.

Q. Now you testified as to views from the Colburn property before the building of this abutment?

A. Yes, sir.

Q. Were you ever in the Colburn house?

A. No, sir.

Q. Then how can you testify as to what view was available?

A. I was in their yard and I can testify to what I saw from the yard.

Q. You did testify that you could see parts of College Hill from the house, did you not?

A. Yes, sir.

Q. Now?

A. Yes.

Q. You are positive of that?

A. Yes, sir.

Q. But you have never been in the house?

A. No. I have been in the yard. What you can see from the yard you can see from the house.

Q. Can you see all of College Hill which appears over here (indicating)?

A. I think so.

[fol. 201] Q. But you have never been in the house?

A. No.

Q. Can you tell us how you figure that out?

A. By the height of College Hill with respect to the height of the property they were talking about.

Q. How high is this at this point (indicating)?

A. About 35 feet.

Q. And you say it is on a grade higher than this grade—it is a higher elevation than before you started putting the bridge embankment there?

A. Yes, sir.

Q. So it is over 35 feet above that level there?

A. No, not where the house is. In the rear of the house—in other words, what is known as the Leidy property—The property slopes back to the Leidy property. There is a drop back there of 2 feet or more.

Q. And you are positive that from the rear window you can see part of College Hill?

A. In my opinion, yes.

Q. Now you testified that the Leidy building was about 22 feet high directly in back of the Colburn property.

A. That is the silk mill?

Q. Yes.

A. That is correct. That is back of the—

Q. A few moments ago you just said this point (indicating) is only a couple of feet higher than the Leidy silk mill.

A. I am talking about elevation now. The height of the building varies.

Q. Do you mean when you are walking along the floor?

A. The land in the Leidy property was not level throughout.

Q. You said there was only about 2 feet difference.

A. No. I said there was 2 feet difference between the land. It slopes in the back. The elevation in the back of the Colburn property sloped to the Leidy property at that particular point.

[fol. 202] Q. Well, that would be more than 2 feet, would it not?

A. Two feet for what?

Q. You said the difference between the elevation of the Leidy property and the embankment was only a couple of feet. Didn't you say that?

A. I do not recall whether I did or not.

Q. You have never been in the Colburn house?

A. No, sir.

Q. Did it ever occur to you that it might be helpful to go in?

Mr. Oakford: I object to that.

The Court: Objection sustained.

Mr. Meyner: Will you have the other section of the model put in here?

(Model placed before the jury.)

Q. Now you have testified that while the area was in this condition there was more air than when it was in that condition?

A. Yes, sir.

Q. Was there more circulating air?

A. In a given cross section I would say yes.

Q. Do you mean an embankment without underpasses for a length of 1,000 feet would give you more circulation than these series of buildings here?

A. Under the conditions as they exist now, yes.

Q. Wasn't it possible to get air between these spaces between the buildings?

A. Oh, sure.

Q. Now it is not possible to get any air except over that embankment, is it?

A. Yes, sure. The air can get around the abutment the same as it can go around a building.

Q. If there aren't any winds or if it is humid, that would make a difference, would it not?

A. It would in both cases, in my opinion.

Q. You testified that before the building of this embankment the Colburns could not see any part of College Hill. [fol. 203] Is that correct?

A. No. I believe I stated they could see College Hill. They could not see the river bank on the eastern side.

Q. The river starts sloping down here (indicating)?

A. Yes, sir.

Q. So it is from the west more than the north?

A. Yes, sir.

Q. The College Hill section is in here (indicating)?

A. Yes, sir.

Q. You have not included that in this exhibit, have you?

A. No.

Q. Can they see as much of College Hill now as they could before, understanding, of course, that you did not see and you are basing your opinion on conjecture?

A. I don't know.

Q. Yet you say they can see College Hill now?

A. Yes, sir.

Q. But you would not say they could see much of College Hill before?

A. Yes, they could see College Hill before.

Q. Could they see more of it?

Q. I do not know without going into some angles between the top of our approach now and the top of the silk mill.

Q. Do you want to go into that?

A. No, because that takes some time.

Q. But that is better than actual observation—working the angles?

A. No, I would not say so.

Q. Now, when you have given the height of the buildings, especially this building (indicating)—what building was that, the barn and shed?

A. Yes.

Q. You have given the height at its highest point?

A. Yes, sir, at the peak, one case.

Q. You have given in one case at the peak?

A. That is true.

Q. So that this area over here would be roughly west (indicating). West is directly opposite to the center line [fol. 204] of that bridge, and that is parallel to this edge of the table, and north is here. West is parallel to that bridge. Does that agree with this map?

A. Yes. Here is east, and west is here.

Q. It would be the same as that line (indicating)?

A. It would be at right angles to that line. This line (indicating) is produced here (indicating.) This line here is produced here, and this line here is parallel to that line there.

Q. Will you produce it?

A. I cannot produce a line parallel with a ruler like that.

Q. You say that is parallel?

The Court: Does it make any difference?

Mr. Meyner: Yes, it does, for the purposes I am trying to bring out, your Honor.

Q. The sun never sets in the north, does it?

A. No.

Q. The sun would set over here (indicating).

A. Yes, sir.

Q. And the embankment would cast no shadow?

A. Not to my knowledge.

Q. Were you ever there to see it?

A. Yes, sir.

Q. Were you there last night?

A. No, I do not think so.

Q. You know the direction of the sun shifts during the seasons?

A. Yes, sir.

Q. It would be a little more to the north in the summer and a little to the south in the winter?

A. Yes, sir.

Q. Did you check it at all seasons?

A. Since we have opened the bridge, yes.

Q. Now, this portion of Easton is a most desirable view, is it not?

A. What do you mean?

Q. Isn't it a better view over this way (indicating)?

A. No.

[fol. 205] Q. Isn't there the green hill and the College Hill buildings over there?

A. Yes, sir.

Q. It is a more desirable view than this, is it not?

A. Well, if you are going on top of College Hill—

Q. I am speaking of it from here (indicating).

A. Yes.

Q. The College Hill view would be better?

A. Yes, sir.

Q. Now you took some elevations there. Will you refer to your previous testimony elevations?

A. (Witness refers to paper.)

Q. You said that the sidewalk in front of the Colburn place was 196.7, did you?

A. That is correct.

Q. What was 206?

A. That was the elevation of the second floor of the Colburn property.

Q. Did you take it by going in there?

A. No.

Q. By rough calculation?

A. Yes.

Q. What was the elevation of the building here (indicating)? You said it was—

A. Where you have your pencil there now is 221.35.

Q. Didn't you give me one of 214?

A. Yes, that is the part where you have your pencil now.

Q. So there is a difference of how many feet?

A. There is about six and a half feet in there, the height of the ventilator of the building.

Q. And it was impossible to look over this?

A. Well, I am just judging by elevation. I do not see how they could look over it.

Q. But it is possible now to look over a 35 foot embankment?

A. In other words, they could look over that building and see part of College Hill.

Q. Wasn't it possible for them to look out here (indicating) this being 99, right in through here?

A. No, I do not know how they could. I am only expressing an opinion now from observation of the condition of the ground and buildings as they are now.

[fol. 206] Q. It is purely your opinion and not from experience?

A. No, it is purely opinion.

Q. What is the elevation of College Hill on that map there?

A. Just what point in College Hill?

Q. We will say the Sigma Nu house.

Mr. Ockford: I object.

The Court: That is the condition that they lost the view of on College Hill?

Q. What is the elevation of the highest point on College Hill? Have you got some point on that map, of College Hill?

A. No. It would be merely recollection on my part.

Q. Then how did you make your angles if you did not have a point up there? How did you make your angles as to whether there would be a view?

A. Well, as far as observing that part of it just from actual observation I made myself from the Colburn property,

from the yard itself. I have never been in the Colburn house.

Q. So you do not know what view they had from the window?

A. No, I do not.

Q. Is that shrubbery on the side thriving very well?

A. On the side of the embankment?

Q. Yes.

A. Yes, it is.

Q. So that it is all foliage now?

A. That is after a year's growth, yes.

Q. There is now foliage all over that bank?

A. I would not say so, no. We had a little washout there. We had a little rain that washed out all the New England states. We are putting it back and we will eventually have it back in grass in that whole area. That is something beyond our control.

Q. This wall to the back of the property has been raised, has it not?

A. That is correct.

Q. How much has it been raised?

A. About 2½ feet.

[fol. 207] Q. You do not know whether that street running down to Second Street and First Street was ordained or was not ordained, do you—this street here (indicating)?

A. That street was not ordained.

Q. But it was open?

A. It was open.

Q. It was used?

A. Yes, it was used.

Q. The public went over it?

A. Yes.

Mr. Meyner: That is all.

Redirect examination.

By Mr. Ockford:

Q. Approximately how far from the Colburn property is the top of College Hill over in Pennsylvania?

A. Close to 1500 feet. That is the top of the hill I am talking about now. Approximately 1500 feet.

Q. Well, 2 feet difference at the point of the Colburn property would make how much difference 1500 feet away, in what you could see?

A. Well, it would be small. Just exactly in feet I could not tell you without doing some figuring on it. If that is 2 feet difference, the elevation in 1500 feet away will make but small difference in the amount of property that can be seen.

Recross-examination.

By Mr. Meyner:

Q. There was no effort to take these pictures from the rear of the Colburn property, was there?

A. No.

Q. So that they were taken from different locations?

A. That is right.

Mr. Meyner: That is all.

The Court: It does not look as though we can finish tonight.

[fol. 208] Mr. Ockford: We have one more witness. I do not think we could very easily finish.

(Adjourned until Thursday, October 13, 1938, at 10 o'clock in the forenoon.)

Belvidere, N. J., October 13, 1938.

(Case resumed pursuant to adjournment.)

(Appearances as before noted.)

Mr. Ockford: I would like to recall Mr. Wilson.

The Court: All right.

WILLIAM H. WILSON, recalled for the Respondent.

Direct examination.

By Mr. Ockford:

Q. Mr. Wilson, have you made some definite calculations of observations from the Colburn property looking toward College Hill?

A. We made some studies from drawings that were used in the construction of this whole project.

Q. And day before yesterday when you testified about your ability to see anything from the Colburn property it

was not quite clear as to from what part of the Colburn property. You say you could see College Hill. Now, have you a diagram to show counsel what you could see? Did you make the elevation?

A. Yes. (Producing paper.)

Q. Before we get to that, what is the elevation of the highest point on College Hill?

[fol. 209] A. At what we know or what is generally known as the Paxinosa Mountain, according to the United States Geological Survey, it is about 500 feet in elevation. Now that is almost due north of the Colburn property.

Q. Across the river, on the Pennsylvania side?

A. That is correct.

Q. Is that point visible from the Colburn property or any part of it?

A. It is.

Q. And from what part of the Colburn property can you see it?

A. I would say from this bedroom window, the second story window. They mentioned the elevation the other day. I mentioned the elevation in my testimony.

Q. Could that point be seen before the bridge construction?

A. No, I do not think so. It was hidden by the Leidy property. That is a view that has been opened up by the demolition of the buildings.

Q. Before the demolition of the buildings to the rear of the Colburn property what, if any, part of this College Hill or Paxinosa Mountain could be seen?

Q. Well, Paxinosa Mountain I do not think could be seen, not from the observation I have made there.

Q. How about College Hill?

A. In studies of this thing we made yesterday—I have taken five different sections from the back yard of the Colburn property and plotted the buildings so that they extended the view from the backyard of the Colburn property on a particular line, and in doing so we tried to give the Colburn property the benefit of any view that they might possibly have had, and in one case I have used a section through there which I feel could not be viewed in view of the fact that the buildings were so close together, and I am pretty well acquainted with that section, but even in that [fol. 210] case I have in making these sections given a per-

son standing in the Colburn yard the benefit of being able to see between the two buildings.

Q. What was the extent of the view looking toward the Pennsylvania side at that time?

A. Well, our plans here show that College Hill could not be seen. I will qualify that, if I may. It may have been possible to see the tops of some of the trees at the top of College Hill, but as far as seeing the side of College Hill, as we know it, from the river bank up to an elevation of 325, which is the top elevation of the trees that could be seen if there were no obstructions at all.

Q. And since the demolition of the buildings and the construction of the bridge embankment, from approximately the same point can you see more or less?

A. Well, it amounts to the same thing. In other words, the distance back of the top of the fill is now horizontal from the top of the Leidy building on the same plane.

Q. In other words, you cannot see any more now or any less of College Hill, is that so?

A. Yes. There have been other views opened up due to the demolition of some of those buildings.

Q. Yes, but I mean looking toward College Hill before and after. From the second story of the Colburn property, did you go in and look from there yesterday?

A. No, I did not. I did not have an opportunity.

Q. And you were never up on the roof?

A. No, sir.

Q. But from the elevation of the buildings and the peaks of these roofs, they can see as much now as they could before, is that it?

Mr. Ockford: I think that is all.

[fol. 211] Cross-examination.

By Mr. Meyner:

Q. Did you ever look out from the Colburn windows before the buildings of the embankment?

A. No.

Q. And you have not looked out since?

A. Only from the adjoining yard, that is all.

Q. Over in here (indicating)?

A. Yes, sir.

Q. You say that this is the same obstruction, it being 22 feet at the same place?

A. Yes, so far as the vision only goes over that distance.

Q. You are sure that they can see College Hill now from their window?

A. Well, I say they can see what we know as Paxinosa Mountain now.

Q. That is above College Hill?

A. It is above College Hill. That whole section from the river road is known in the City of Easton as "College Hill".

Q. You have not taken any view from the window?

A. No.

Q. But you did when standing in the adjoining yard?

A. That is true.

Q. Now, this property known as 99, from the back yard, was about level with the Leidy land, was it not?

A. I think there were about 2 feet of difference in elevation there.

Q. And at the time of the building of the bridge it was about level, was it not?

A. No, I think it was about 2 feet, that there were about 2 feet difference in elevation.

Q. Do you remember the garage there?

A. On the Colburn property, yes.

Q. Did they have a dip of 2 feet when they came out to their garage?

A. No.

Q. Then how do you account for the 2 feet?

A. The floor in the garage, as I recall it, was level with the Leidy property, and the ground in the Colburn yard, [fol. 212] as I recall it now, was lower than the floor of the garage.

Q. Wasn't it a gentle slope of 2 feet from the front to the back?

A. Yes, that is true.

Q. When you took your measurements you took them at the front of the house?

A. Of what?

Q. Of the level?

A. Yes, the measurements over the whole property were taken with respect to sea level—not merely the Colburn property.

Q. This map is according to scale?

A. Yes, sir.

Q. And the scale of this is exactly the same as the scale of that (indicating)?

A. Yes, sir.

Q. And you say this gave you one more obstruction to view than that (indicating) did?

A. No. When you are looking at it from a distance. If you are observing points 2,000 feet away, the line—

~~Q. You are not talking about the windows.~~

A. No. I am talking about the yard.

Q. Was your testimony this morning concerning the yard?

A. Yes, sir.

Q. Nothing about view from the windows?

The Court: We have had that four times. I think we all understand it. He has not been in the house to look out the window.

Mr. Meyner: It seems to me, your Honor, he has testified to the view.

The Court: Yes, from the ground. We all understand that he was not in the place.

[fol. 213] Mrs. BESSIE COLBURN, recalled for the Respondent.

Direct examination.

By Mr. Oekford:

Q. Mrs. Colburn, one or two of the witnesses have said something about improvements in your house that obviously have been made in fairly recent years. Now, when was it that you had the house altered so that you could have a separate apartment on the second floor, how long ago?

A. Nine years.

Q. And at that time did you and your husband install a new bathroom on the second floor?

A. On the first floor. There was one on the second floor.

Q. Did you put in a new kitchen somewhere?

A. On the first floor and second floor both.

Q. What else did you do in the way of changing or remodeling?

A. Tearing out partitions and making an open staircase and building an extra kitchen and extra bathroom and putting new heat in.

Q. Do you remember what the bathroom and kitchen fixtures cost you at that time, about?

A. Well, if I knew you wanted it I could have brought the papers.

Q. No, as near as you could tell. We know you are telling the truth about it.

A. Why, it was a contract—the kitchen, bathroom and bedroom.

Q. And that included the labor and material and fixtures?

A. Yes, sir.

Q. What did it amount to?

A. Over \$1,000.

Q. That is for the kitchen and bedroom and bathroom?

A. Yes, sir.

Q. Well, how much over a thousand dollars?

A. I cannot exactly tell.

Q. Just about a thousand dollars, and it might be a little over?

A. Yes, and two bay windows we put in at that time.

[fol. 214] Q. And that is the improvement that was made in that property since you bought it?

A. Oh, no. When we bought the property there wasn't any water with it. We had a cistern outside, and it wasn't even to the curb; there wasn't any water, light or heat on the property when we bought it.

Q. Did you have assessments to pay since you bought it?

A. We certainly must have had assessments.

Q. Well, did you?

A. Yes.

Q. What did they amount to?

A. I do not know.

Q. Since 1936, before the bridge was built, you had not made any improvements in the property, had you?

A. Just here this last summer, a cold air system on the furnace to get some air in the house.

Q. What did that cost?

A. \$125.

Cross-examination.

By Mr. Meyner:

Q. When you were asked about assessments, do you know what he means by "assessments"?

A. No, I do not.

Redirect examination.

By Mr. Ockford:

Q. Can you give us approximately the total amount of money you have paid for improvements since you bought the property?

A. Over \$4,000 altogether, since we bought it.

Q. Do you mean in addition to what you paid for it?

A. Yes, sir.

Q. And a thousand dollars of that was for the bathroom and kitchen?

A. The repairs, and putting in the apartment.

Q. What other items are there beside this hot water heater?

A. What do you mean; just lately?

[fol. 215] Q. Yes. What did you spend this money for beside this improvement you mentioned?

A. There was nothing in the house when we bought it. It did not even have that kitchen. We tore the kitchen away.

Q. I am not talking about repairs and carrying the property, or paying taxes. You put in a new bathroom and two kitchens?

A. Yes, and a bedroom downstairs. We had a kitchen downstairs and had to make a bedroom downstairs.

Q. Did you build an addition or annex?

A. We built a kitchen to the house, and what is the bedroom now we built onto the house.

Q. Sort of an extension?

A. Yes, sir.

Q. How much did that cost?

A. The kitchen was thirteen hundred and some dollars.

Q. Is that just a one story extension?

A. Yes.

Q. When was that put in?

A. When we turned the house into an apartment, eight years ago.

Q. And that is all the improvements?

A. And then we built a kitchen for ourselves and a bathroom for ourselves, I think, at the same time.

Q. This was all done eight years ago?

A. Yes, sir.

Mr. Ockford: All right.

Mr. Meyner: That is all.

CHARLES BILLGER SWORN FOR THE RESPONDENT.

Direct examination.

By Mr. Pursel:

Q. Mr. Billger, where do you live?

A. Phillipsburg.

Q. What part of Phillipsburg?

A. The North End of Phillipsburg.

[fol. 216] Q. What street do you live on?

A. North Main Street.

Q. What number?

A. 171 North Main Street.

Q. That is in the neighborhood of Hess Street?

A. Yes, right at the corner of Hess Street.

The Court: Will you point out on the map, so the jury know where you live.

Q. Can you point it out on the map?

A. (Witness indicates on map.)

Q. This is Hess Avenue, and Union Square is down that way (indicating) and Meadow Avenue is up that way. Now, do you live on that side of Hess Avenue, or this side?

A. This side (indicating).

Q. How long have you lived there?

A. Three years.

Q. And have you lived in the North End section prior to that?

A. All my life.

Q. Were you born there?

A. Yes, sir.

Q. Where have you been employed?

A. At the American Horseshoe Works.

Q. How long?

A. Forty-eight years.

Q. Are they in operation now?

A. No.

Q. Are you still employed by them?

A. Yes, sir.

Q. In what capacity?

A. Watchman.

Q. How long have you been watchman?

A. About eleven or twelve years.

J The Court: What do you watch?

The Witness: The plant.

Q. You are familiar with the American Horseshoe property, of course, and the Watson property, next to it?

A. Yes, sir.

Q. And with the location of the municipal beach of the [fol. 217] city to the south of the Watson property?

A. Yes, sir.

Q. Do you know where First Street is?

A. Yes, sir.

Q. Where does First Street start?

A. (Witness indicates on map.)

Q. And where does it go to?

A. Shimer.

Q. Did it go beyond the railroad tracks?

A. Years ago.

Q. Then there was a railroad crossing there?

A. Yes, sir.

Q. When you got across the railroad tracks was there an open road there on out to the river, or not?

A. There was a road but it was chained off.

Q. Who chained it off?

A. The Horseshoe Company and the Watson Company.

Q. Did you have anything to do in connection with the chain?

A. When they took it down I had to put it up.

Q. And it was your duty to replace it?

A. Yes, sir.

Q. What was that chain fastened to?

A. Two iron posts.

Q. How many years was that chain there?

A. Well, it was there about twelve years ago.

Q. And it was there until when?

A. Until they tore it down.

Q. What do you mean, about the time they built the bridge?

A. Yes.

Q. So that people in crossing did not have free access through that road?

A. Yes. And then there was a big wooden gate there, to the Watson plant.

Q. And people did not go through that way?

A. No.

Q. Would people crawl under that chain or go over it?

A. They crawled under it.

[fol. 218] Q. And they had to do that in order to get down that lane toward the river?

A. Yes, sir.

Q. Was the railroad there in that section located at about grade with the rest of the area?

A. Yes, sir.

Q. The same level?

A. Yes, sir.

Q. Was it or not the practice of people when they were crossing over to the river to cross the railroad at various points?

A. They had to do that.

Q. And do they still do that?

A. Yes, they go up and down the track.

Mr. Pursel: That is all.

Cross-examination.

By Mr. Meyner:

Q. What do you do for the American Horseshoe Company?

A. Watch and labor around and clean up.

Q. Who asked you to come here today?

A. I was subpoenaed.

Mr. Pursel: I object to that.

The Court: He has answered it. He says he was subpoenaed.

Q. (Showing witness photograph.) Do you recognize this picture? Did you ever see that picture before?

A. No, sir.

Q. Did you ever see what is on there before?

A. Yes, Freihofer's ball park.

Q. Will you show me where the chain was.

Mr. Pursel: I think, your Honor, a little explanation of the picture might be helpful. He is looking all over the picture. You are looking at it from the east. Do you see the river?

[fol. 219] The Witness: Yes.

Mr. Pursel: This is the Jersey bank of the river.

The Witness: Yes.

Mr. Pursel: There (indicating) is Freihofer's field.

Mr. Meyner: Your Honor——

The Court: We cannot spend all day while he comments on this picture.

Mr. Pursel: On this picture I point out the remaining buildings of the American Horseshoe Works and the Watson Silk Mill. This was North Main Street and First Street came in that way, across the tracks and through that way. Now do you recognize it?

The Witness: Yes. (Indicating.) Here is where the gate was.

Q. Where was the chain?

A. Here (indicating).

Q. Right here?

A. Yes, sir.

Q. Couldn't they come down this way and down North Main Street?

A. No. You could not go down the track.

Q. Was it that way always, there?

A. Always.

Q. For how long?

A. About twelve years.

Q. Was it your job to fasten and unfasten it?

A. I did not have to unfasten it. I had to fasten it when they got it down.

Q. So that in the last twelve years there is no time in your mind when that chain was down?

A. It was down when they opened up.

Q. There was no other way to get down into the Union Square section?

A. That was the only way.

Q. You do not know whether it was a public street or not, do you?

A. It was a private street.

Q. You thought it was a private street?

A. Yes.

[fol. 220] Mr. Meyner: That is all.

Mr. Pursel: We rest.

The Court: Have you any rebuttal?

Mr. Meyner: I will call Mr. Johnson.

URIAH JOHNSON, sworn for the Relators in rebuttal.

Direct examination.

By Mr. Meyner:

Q. Where do you live, Mr. Johnson?

A. 157 North Main Street.

Q. Do you know where Mr. Billger lives, the previous witness?

A. Yes.

Q. Where do you work?

A. The D. L. & W. Railroad.

Q. Did you ever go down to Union Square by way of First Street?

A. Several times.

Q. Did you ever notice a chain across the road?

A. No, sir.

Q. At any time?

A. I never noticed it at any time. It probably could have been there, but I never noticed it. I went down there anywhere from twenty-five to fifty times in the last four years and there was no chain there to stop me.

The Court: Are you talking about the same place?

The Witness: Yes, sir.

Q. That would be, according to this map Exhibit P-5, down First Street?

A. And across the tracks and back around Watson's mill and down the beach there and over to Easton.

Q. You never saw a chain there?

A. I never saw it.

[fol. 221] The Court: You were not one of those that the other witness said put the chain down, were you?

The Witness: No, sir. I had occasion to go through there a couple of times on account of the trains blocking the crossing off, to get to the Square.

Mr. Pursel: That is all.

Mr. Meyner: That is all.

COLLOQUY

The Court: Do both sides rest? How long do you want to sum up to the jury?

Mr. Stout: May it please the Court, before the summation I desire to move for a direction.

The Court: I will hear you in chambers.

Mr. Meyner: If your Honor please; I neglected, before resting, to ask for one thing.

The Court: What is it?

Mr. Meyner: I have just found out that the Van Gordens have conveyed back to the Colburns and given a mortgage. I would like to have an opportunity of presenting that in the record which would be returnable to the Supreme Court.

The Court: Do you mean the Colburn deed and the agreement have now been substituted by a mortgage?

Mr. Meyner: Yes, your Honor, and it is in the County Clerk's office at the present moment for recording.

Mr. Stout: Of course, the situation is as at the time the application was made for the writ.

The Court: I think I should report the whole story.
[fol. 222] Mr. Stout: Do you mean that the Van Gordens were the owners of this property at the time?

The Court: I am going to report in the postea that they received a deed some two years ago and conveyed to the Van Gordens under an agreement to reconvey and now, today, the Van Gordens conveyed back to the Colburns and there has been a mortgage placed on the record. I think I will report the whole fact to the Supreme Court.

Mr. Meyner: Mr. Clerk, will you get the deed and mortgage that has just been sent down for record?

The Court: Mr. Meyner, how long do you want to sum up?

Mr. Meyner: About ten or fifteen minutes. (Referring to papers.) I should like to present at this time—

The Court: Is there any dispute about this?

(Mr. Stout examines papers.)

Mr. Meyner: I should like to present the warranty deed—

Mr. Stont: I take it that counsel is making an offer to introduce in evidence a deed of the Van Gordens to the Colburns for the property in question, and a mortgage of the Colburns to the Van Gordens, and if he is making the offer I would like to have an objection noted on the record that these instruments, the deed and the mortgage respectively, bear date as of yesterday. It does seem to me that during the course of this trial that the Relators could change their status as to their ownership of this property. It

would seem by these papers that the title to the property [fol. 223] was in the Van Gordens on October 12, 1938, because they make a deed of conveyance. That is not in accordance with this agreement which was made by way of a mortgage back some two years ago.

I say for these reasons that it appears by these papers that he offers in evidence that the Van Gordens were the owners of this property at the time that the alternative writ of mandamus was allowed, and they continued to be the owners of the property up to October 12, 1938, when they conveyed the property to the Colburns and took back a mortgage.

The Court: I think there is no dispute about that, Senator.

Mr. Stout: I just want that on the record.

The Court: I will certify to the fact as practically one with which we are all in agreement.

Mr. Meyner: I have the man who executed the papers.

The Court: Mr. Stout does not object to the execution of the papers.

Mr. Stout: I do not object to the execution of the papers.

The Court: Read it into the record.)

Mr. Meyner: I offer in evidence a deed dated October 12, 1938, acknowledged October 12, 1938, between Willis Van Gorden and Elizabeth Van Gorden, his wife, and John D. Colburn and Bessie Colburn, husband and wife, reciting one dollar and other good and valuable consideration, conveying the premises in question. Acknowledgment was [fol. 224] taken before George W. Fleming, an attorney at law of the State of New Jersey.

The Court: Is it recorded?

Mr. Meyner: It is received at the Warren County Clerk's Office October 13, 1938 at 10:20 A. M., and about to be recorded.

(Paper referred to and offered in evidence is marked Exhibit P-11.)

Mr. Stout: Is not an instrument, when it is received by the recording officer, considered to be already recorded?

The Court: I think so. I do not think there is any doubt about it being recorded.

Mr. Meyner: I am willing that it should be recited as recorded.

Mr. Stout: The receiving of it is the act of recording it.
The Court: Yes.

Mr. Meyner: I offer in evidence an instrument marked "Mortgage", dated October 12, 1938 and acknowledged October 12, 1938, before Bessie S. Fritts, a Notary Public of New Jersey, between John D. Colburn and Bessie Colburn, his wife, and Willis Van Gorden and Elizabeth Van Gorden, husband and wife, reciting an indebtedness of \$1800, to be paid on the fifteenth day of October 1939, with interest computed from October 15, 1938 at the rate of 6% per annum, on the premises in question.

(Paper referred to and offered in evidence is marked Exhibit P-12.)

The Court: And recorded—

[fol. 225] Mr. Meyner: October 13, 1938, at 10:20 A. M., in the Warren County Clerk's Office.

The Court: Now, are you ready to commence your closing remarks? We will take a short recess for about five minutes. I want to talk to counsel.

(Court and counsel retire to chambers.)

MOTION FOR DIRECTED CERTIFICATION

Mr. Stout: I move for a directed certification that the facts are found as follows:

First. The construction of the bridge and approach thereto did not deprive relators' property of light, air, view and access to which it was legally entitled.

Second. The construction of the bridge and approach did not invade any legal right appurtenant to relators' property nor injure relators' property.

Does the Court desire to hear argument on the motion?

The Court: What have you to say about this, Mr. Meyner?

(After argument.)

The Court: The view that I take of it, Senator Stout, is this: That apparently these Relators are proceeding upon the theory that the language of the statute where it says to the effect that compensation shall be made for persons whose property has been taken, injured or destroyed creates in them a right in New Jersey that did not exist before

the passage of this joint legislation, and they in pursuance of that right went to the Supreme Court and obtained this alternative writ.

It seems to me that the main question here is not whether they legally had a right to the view, air and access, as far [fol. 226] as we are concerned, but whether this alleged view with the air and so forth has been curtailed or damaged to the extent of depreciating the value of their property and those entering on their property. Taking that view, I am going to deny the motion and you may have an exception.

(Court and counsel return into Court.)

Mr. Meyner: Will your Honor accept a request to the effect that the jury ought to disregard newspaper accounts? There was an account in the paper last night about their being a slaughter house back there, and there is no evidence of it.

The Court: I will undoubtedly tell them that they will have to decide it on the evidence they heard in the court-room.

(Counsel proceeded with summation.)

CHARGE TO JURY

The Court (Leyden, J.): Members of the jury. In this litigation John D. Colburn and Bessie Colburn are known as the relators, or, you might describe them as the plaintiffs, the persons who are asserting an alleged right, and the Delaware River Joint Toll Bridge Commission of Pennsylvania and New Jersey is the respondent and is the one who must answer in the litigation, or, we might call them the defendant.

Our function here in this trial is to listen to the proof offered by both sides, the relators and the respondent, and to ascertain and determine certain facts so that those facts as ascertained by us may be used in another proceeding before the Supreme Court of the State of New Jersey.

Of course, you realize that a law suit being of this nature is like a debate where the one side asserts the affirmative of a proposition and the other side the negative. In order to arrive at the questions to be debated we have what is known in the law as pleadings—usually in litiga-

on it is a complaint—on the part of those who assert the affirmative of the dispute.

In this particular case the complaint is an alternative writ of mandamus issued by the Supreme Court upon the relators of the Colburns, and in the complaint, as we will call it, the Colburns allege that they were the owners in fee simple of a certain house and lot in the Town of Phillipsburg in the County of Warren which is laid down and known as Number 99 North Main Street, and the house is equipped with modern improvements. And they go on to say that prior to the construction and the building of this new Easton-Phillipsburg bridge and its approach by the respondent the Delaware River Joint Toll Bridge Commission the Colburns property was bounded by North Main Street and a high, steep, wooded hill on the opposite side of North Main Street, and to the west it was bounded, in the rear, by tracts of land occupied by buildings of varying height, separated by a space between the buildings, thus permitting to the relators' property light, air and view of the opposite bank of the Delaware River, that is, the Pennsylvania bank of the Delaware River.

The relators go further and say that their premises on North Main Street were an integral part of the North Main section of Phillipsburg and were adjacent to and accessible from other parts of the Town of Phillipsburg by reason of a number of streets mentioned, which were First Street, Drinkhouse Avenue, Second Street, Broad Street, Skillman Alley, Plotts Alley, Wire Alley, Chitewink Alley and Rose Street.

[Vol. 228] They go on and allege that the respondent, the Delaware River Joint Toll Bridge Commission, acquired a number of properties abutting on these streets and by virtue of the provision of the law in such matters when the bridge Commission had acquired the property abutting on those streets the street itself reverted to the abutting owners and consequently reverted to the Bridge Commission with the result that the streets were closed, either in whole or in part, and by reason thereof the Colburns have been deprived of access to and from their property, the access that they formerly had to their property.

They go on further to allege that the Delaware River Joint Toll Bridge Commission built an embankment or approach to the bridge for a distance of about one thousand feet, starting at nothing and rising to a height of some

thirty-five feet in back of their place, which embankment or approach cut off the relators' property from the balance of the North Main Street section of Phillipsburg, and that by reason of the construction of this embankment their premises have been deprived of air, light and view and have been placed in an artificial valley.

Then they go on to say that by reason of this curtailment of access and the obstruction of the light, air and view the Colburns' property has been injured, that is, it has depreciated in value, that it is not worth now what it was worth before the construction of the bridge and the approach thereto.

The respondent, answering that complaint, denies that by reason of the construction of this approach to the bridge or the elimination of the streets there has been any damage, any deprivation of light, air and view. The respondent denies in its pleading that there has been any injury as the [fol. 229] result of the closing of the streets, and it denies that there has been any injury to the property, that it has depreciated in value by reason of the construction of the bridge and the approach thereto.

Now those briefly are the allegations by which we arrive at the question that we are to decide, and out of them all I have concluded that we have five questions before us for decision, and the first is:

Has the erection of the bridge and the construction of the approach thereto deprived the relators' real property of the light, air and view of the opposite bank of the Delaware River it formerly had?

And the second question:

Was the relators' real property an integral part of the North Main Street section of Phillipsburg, and was it adjacent to and accessible from other parts of the Town of Phillipsburg via First Street, Drinkhouse Avenue, Second Street, Broad Street, Skillman Alley, Plotts Alley, Wire Alley, Chitewink Alley and Rose Street?

And the third question?

Has access to and from relators' real property been curtailed by the construction of the bridge approach and by the abandonment in whole or in part of said streets, and has relators' real property thereby been set off in an isolated section of the Town of Phillipsburg?

The fourth question:

Has relators' real property been deprived of light, air and view, and has it been placed in an artificially created shadow by the construction of the bridge and the approach thereto?

And then the two main questions in the case are the last:

Q. 230] Has the relators' real property been injured, i. e., depreciated in value by reason of the curtailment of light and view thereto by the construction of the bridge and the approach thereto?

And the last:

Has the relators' real property been injured, i. e., depreciated in value by reason of the obstruction of view, light and air by the construction of the bridge and the approach thereto?

I shall give you this typewritten list of questions and you may take it into the jury room with you and when you conclude your deliberations and answer these questions you can write the answers that you get alongside of or at the bottom of each question so that we properly can understand your verdict when you bring it out.

The other allegations in the alternative writ and in the return must be taken care of by the Court alone in making the postea to the Supreme Court; because in those matters there seems to be little or no dispute between the respective parties.

You have heard the testimony offered in behalf of the relators in substantiation of or attempted substantiation of their allegations, their side of the case; and you have likewise heard the proof offered in behalf of the respondent, the Bridge Commission, in substantiation of or attempted substantiation of its side of the matter, and I shall not burden you with a recitation of my recollection of the testimony. I shall just give you the general principles of the law by which you should be guided in the decision of those matters.

The burden of proof, under our system of jurisprudence, is upon the relators to establish their cause of action to the satisfaction of the jury by a preponderance of the evidence.

Q. 231] By the phrase "preponderance of the evidence", the Court does not necessarily mean the largest number of witnesses who may have testified in the case as to any given

fact. Preponderance means the greater weight. It is the quality of the evidence and not the quantity of witnesses with which you are concerned. There is no technical meaning to the term "preponderance of the evidence". It simply means that the burden is cast upon the relators to support their allegations by the greater weight of the evidence than evidence adduced against them by the respondent. That is, the evidence produced by the relators must in your judgment weigh at least a little more than the evidence produced by the respondent against the claim. If, the evidence in your judgment is just evenly balanced the relators would not be entitled to your verdict, for they would not have sustained the burden of proof. Likewise, if the evidence in behalf of the respondent in your judgment outweighs that given on behalf of the relators then the relators would not be entitled to your verdict, for the same reason.

It is my duty to state to you the law applicable to the case and it is your duty to pass upon the questions of fact, and neither the Judge nor the jury may trespass upon the province of the other. Our provinces are entirely distinct and separate. You should accept the law as I state it to be, notwithstanding that you ~~firmly~~ believe that I am wrong and the law is or should be otherwise. With questions of fact, the weight of the evidence, the inferences you will draw therefrom and the questions that will ultimately come from the evidence the Court has nothing to do. Those are matters entirely within your province which you as jurors must determine for yourselves.

As the sole judges of the facts you are to determine the [fol. 232] credibility of the witnesses. In determining whether or not a witness is worthy of belief and therefore credible you may take into consideration the appearance and demeanor of the witness, the manner in which he or she may have testified, their interest in the outcome of the trial, if any; and you may also consider which is the most logical, the most reasonable and the most probable story. If you believe that a witness knowingly and wilfully testified falsely to any material fact in this case you may give such weight to his or her testimony on the other points as you may think it entitled to or you may disregard it altogether.

It is your duty to weight the testimony and reconcile it if possible. If there be any irreconcilable conflict in the testimony you should take the evidence which you think

worthy of credit and give it such weight as you think it is entitled to.

In this case you have had presented to you a man who was admitted by the Court as having special expert knowledge of values of real estate. In qualifying that gentleman use was had of a number of other purchases by the Bridge Commission of what I determined from the proof to be comparable property. The basis of that testimony was merely to qualify Mr. Smith, I think his name was, as an expert to testify, and quite obviously you are not to consider prices paid by other buyers in connection with this case, except insofar as it relates to the qualification of Mr. Smith to give you the testimony relating to the Colburn property which he did give you.

The testimony of an expert such as I admitted Mr. Smith to be on a subject so little known to the general public is entitled to respect. Such testimony, however, must be submitted to the judgment of the jury, to your judgment and consideration, to be weighed by you as a part of the evidence in connection with the other facts in the case. The testimony of experts is to aid and assist the jury, not to dominate or control them in the decision of questions of fact. Their opinions are deductions from the evidence before you. Their judgments and opinions do not conclude you. You are required upon your own responsibility to decide disputed questions of fact after a consideration and comparison of all of the evidence in the case.

You have had an opportunity to view the premises in question. You may make use of that view of the premises in forming your judgment of the testimony and in reaching an opinion upon its consideration. Your opinion upon the questions you are to decide should be based upon the testimony as thus understood by you and applied to what you have seen. It may well be that your judgment of the testimony may in some cases be modified and in extreme instances perhaps controlled as the result of your view of the land. It may well follow too that as to some testimony that to understand it in the light of your view is to discredit it, while as to other testimony, to so understand it is to accept it even in the face of contradiction or denial:

The evidence has been placed before you, and a discussion of the facts by counsel for either side has been had, and such instructions as will aid you to reach a correct decision has been given. Quite obviously you should not permit

sympathy, passion, bias or prejudice or your ideas of what the law should be or whether the law sought to be enforced here is a good and desirable law to affect or interfere with you in any degree, and when you go to your room to deliberate [fol. 234] you should not refer to, consider or discuss anything in connection with this case, except the evidence received upon the trial. All extraneous matters, statements and suggestions should be carefully discarded by you and you should base your verdict solely upon the evidence and be guided by these instructions alone. The arguments of counsel for the relators and for the respondent are for the purpose of aiding you to reach a proper verdict by refreshing in your minds the evidence that has been given to you in the case and by the application of the law thereto and you will bear in mind it is your duty to be governed in your deliberations by the evidence as you understand it to be true and by the law as given by the Court in these instructions.

I have been requested by the respondent to charge certain propositions of law, the first of which I refuse to charge, the second of which I refuse to charge, the third of which I refuse to charge, the fourth of which I refuse to charge.

The fifth I will charge:

"The jury must not consider the individual and personal comfort, convenience and tastes of relators or persons living upon relators' property but the injury, if any, must be found to the property itself as such."

And the sixth request I will charge:

"Any inconvenience which is suffered equally with the general public furnishes no basis for the claim of injury to property". I so charge you.

The seventh request to charge I refuse, except insofar as I have already done so.

The eighth request to charge I refuse to charge except insofar as I have already done so.

The ninth request to charge I refuse to charge.

[fol. 235] The tenth request to charge I refuse to charge, except insofar as I have already done so.

Counsel for the relators has also called my attention to the fact that you are not to consider any account that you may have read or heard outside of the courtroom, for in-

stance, the newspapers, if any, or discussions that you may have heard or had in your presence, and you are to determine this case solely upon the evidence that was produced here in the courtroom.

I think I can help you no further. I know that you will undoubtedly give the case the consideration to which it is entitled and that your verdict will be a just one.

You may swear an officer.

What we want you to do, members of the jury, as Senator Stout has called to my attention, is to bring in the answers to these six questions.

EXCEPTIONS TO REFUSAL TO CHARGE

Mr. Ockford: I respectfully except, in behalf of the respondent, to your Honor's refusal to charge the requests Nos. 1, 2, 3, 4 and 9.

The Court: Exceptions will be noted.

(The jury retired.)

RESPONDENT'S COUNSEL REQUESTED THE COURT TO CHARGE AS FOLLOWS:

1. Unless the jury find that relators' property were deprived of a legal right appurtenant to their property they must find that relators' property was not injured by the construction of the bridge and its approach.
2. Relators' property was not entitled to have the adjoining premises kept open and free of structures which might [fol. 236] interfere with air, light and view.
3. There is no right in law to a view across adjoining premises.
4. Access to property is had only by means of the street or streets upon which it abuts and lies along.
5. The jury must not consider the individual and personal comfort, convenience and tastes of relators or persons living upon relators' property, but the injury if any must be found to the property itself as such.
6. Any inconvenience which is suffered equally with the general public furnishes no basis for a claim of injury to property.

7. The jury must not allow sympathy for relators to play any part in their deliberations, they are concerned solely with legal injury to property as such.

8. The jury must disregard expert opinions unless they are found to be based upon substantial and reliable foundations and not mere guesswork.

9. The jury must find by a preponderance of all the evidence that there has been a diminution in the value of relators' property due to the construction of the bridge and its approach and an invasion of a legal right before they can find that relators' property has been injured.

10. The jury may accept or reject expert opinions and may use their own judgment and experience in weighing expert opinions.)

[fol. 237]

RELATORS' EXHIBIT P-1

(Deed from Kiefer to Colburns)

This Indenture, Made the 30th day of September, in the year of Our Lord One Thousand Nine Hundred and Nineteen between Carrie Kiefer, Spinster of the City of Chicago, in the County of Cook and State of Illinois of the First Part: and John D. Colburn and Bessie Colburn, his wife, of the City of Phillipsburg, in the County of Warren and State of New Jersey of the Second Part:

Witnesseth, That the said party of the first part, for and in consideration of One Dollar and other Valuable Considerations lawful money of the United States of America, to her in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to their heirs and assigns forever all house, tract or parcel of land and premises, hereinafter particularly described, situate lying and being in the town of Phillipsburg, in the County of Warren and State of New Jersey.

Beginning on the westerly side of North Main Street at a point, the intersection of the northern boundary of property of Margarite Bachman and the building line of North Main Street, thence extending northwardly along building line of North Main Street twenty five (25) feet, more or [fol. 238] less, to corner of land of Levi Willever, thence extending of this width in depth one hundred twelve (112) feet west to land of Claire Silk Mill Company.

Bounded on the north by land of Levi Willever, on the east by North Main Street, on the south by property of Margarite Bachman, and on the west by property of Claire Silk Mill Company.

Being the same premises which Margarite Bachman and William Bachman which by their indenture dated April 1, 1887 and recorded in the County Clerk's office for the County of Warren, New Jersey, in Deed Book 132, page 228 &c., did grant, bargain, and confirm unto Carrie Kiefer, party hereto, her heirs and assigns.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever:

And the said Carrie Kiefer, Spinster does for her heirs, executors and administrators covenant and grant to and [fol. 239] with the said party of the second part, their heirs and assigns, that she the said Carrie Kiefer is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to

be made, for the above described land and premises, can or may be changed, charged, altered, or defeated in any way whatsoever.

And also, that the said party of the first part now gives good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid:

And also, that she will warrant, secure, and forever defend the said land and premises unto the said John D. Colburn and Bessie Colburn, his wife, their heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

In witness whereof, the said party of the first part has hereunto set her hand and seal the day and year first above written.

Carrie Kiefer.

Signed, Sealed and Delivered in the presence of Laina G. S. Peltzer.

Revenue Stamps \$2.50.

[fol. 240] STATE OF ILLINOIS,
County of Cook, ss:

Be it remembered, that on this 30th day of September in the year of our Lord One Thousand Nine Hundred and Nineteen before me, a Notary Public personally appeared Carrie Kiefer, spinster who, I am satisfied is the grantor mentioned in the within Indenture, and to whom I first made known the contents thereof; and thereupon, has acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed: And the said Carrie Kiefer, spinster being by me privately examined, separate and apart from her relatives, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of them.

Clement B. Fliteraff, Notary Public. My Commission expires Sept. 14, 1920.

Illinois County Clerk's certificate dated October 23, 1919 attached to acknowledgment.

Recorded in the Warren County Clerk's office in Book 215 of Deeds, on pages 429, etc. on November 7, 1919.

RELATOR: EXHIBIT P-2

(Deed from Colburns to Van Gordens)

This Indenture, made the nineteenth day of October, in the year of our Lord one thousand nine hundred and thirty-six between John D. Colburn and Bessie Colburn, his wife, [fol. 241] of the Town of Phillipsburg, County of Warren and State of New Jersey, hereinafter known as the Grantors and Willis Van Gorden and Elizabeth Van Gorden, husband and wife, of the Township of White, in the County of Warren and State of New Jersey, hereinafter known as the Grantees.

Witnesseth, that in consideration of the sum of One Dollar and other good and valuable consideration the said grantors do grant, bargain, sell and convey, unto the said grantees their heirs and assigns, all that certain tract of land and premises situate in the Town of Phillipsburg, in the County of Warren and State of New Jersey.

Beginning on the westerly side of North Main Street at a point, the intersection of the northerly boundary of property of Margarite Bachman and the building line of North Main Street; thence extending northerly along building line of North Main Street, twenty-five (25) feet, more or less, to corner of Levi Willever; thence extending of this width in depth one hundred twelve (112) feet west to land of Claire Silk Mill Company.

Bounded on the North by land of Levi Willever, on the East by North Main Street; on the South by property of Margarite Bachman; and on the West by property of Claire Silk Mill Company.

Being the same premises which Margarite Bachman and William Bachman which by their indenture dated April 1, 1887, and recorded in the County Clerk's Office for the County of Warren, in Deed Book 132, page 228 etc., did grant, bargain, and confirm unto Carrie Kiefer, her heirs and assigns.

Being same lands and premises conveyed by Carrie Kiefer, a single woman to said John D. Colburn and Bessie Colburn, his wife, by deed dated September 30, 1919, and [fol. 242] recorded in said Clerk's office in Deed Book 215 page 429, etc.

It is also intended to convey all rights given and received in accordance with a certain agreement dated April 29, 1927, made between John D. Colburn and Bessie Colburn, his wife,

and Adam Ciemiecki and Stanislawa Ciemiecki, husband and wife, recorded in Book 245 of Deeds, page 376 pertaining to the use of certain gas and sewer pipes affecting the house on the lands herein described.

To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said grantees, their heirs and assigns forever.

And the said grantors for themselves, their heirs, executors and administrators, covenant with the said grantees as follows:

- (1) That they are lawfully seized of the said land.
- (2) That they have the right to convey the said land to the grantees.
- (3) That the grantees shall have quiet possession of the said lands and that the same are free from all encumbrances.
- (4) That they will execute such further assurances of the said land as may be requisite.
- (5) That they have done no act to encumber the said land.
- (6) That they will warrant generally the property hereby conveyed.

[fol. 243] In witness whereof, the said grantors have hereto set their hands and seals the day and year above written.

John D. Colburn. (Seal.) Bessie Colburn. (Seal.)

Signed, Sealed and Delivered in the present of George W. Fleming.

U. S. I. R. Stamps \$1.50.

STATE OF NEW JERSEY,

County of Warren, ss:

Be it remembered, that on this nineteenth day of October, in the year of our Lord one thousand nine hundred thirty-six, before me, the subscriber, an attorney at law of New Jersey, personally appeared John D. Colburn and Bessie Colburn, his wife, who I am satisfied are the grantors mentioned in the within deed, and to whom I first made known the contents thereof, and thereupon they each acknowledged

that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

George W. Fleming, Attorney at Law of New Jersey.

(Recorded in the Warren County Clerk's office on October 3, 1936 in Book 281 of Deeds for said County on page 127.)

fol. 244] RELATORS' EXHIBIT P-3

(Agreement Between Van Gordens and Colburns)

Memorandum of Agreement, made this Nineteenth day of October, One Thousand Nine Hundred and Thirty-six, between Willis Van Gorden, and Elizabeth Van Gorden, his wife; of the Township of White, in the County of Warren, and State of New Jersey, party of the first part; and John D. Colburn and Bessie Colburn, his wife, of the Town of Phillipsburg, in the County of Warren, and State of New Jersey, party of the second part:

Whereas, the party of the second part has this day conveyed to said party of the first part, a certain lot located in the Town of Phillipsburg, in the County of Warren and State of New Jersey, more fully described in a deed dated September 30, 1919, made by Carrie Kiefer, a single woman, to John D. Colburn, and Bessie Colburn, his wife, which said deed is recorded in the Warren County Clerk's office in Book 215 of Deeds, pages 429 etc., to which for greater certainty reference may be thereto had.

Now, Therefore, the party of the first part, for and in consideration of the conveyance to them of the aforesaid property, by deed bearing even date herewith, and the further consideration of One Dollar, the receipt of which is hereby acknowledged, hereby agree with the party of the second part, that they will reconvey the said property this day conveyed to them by the party of the second part within the term of two years from the date hereof, upon the party of the second part paying to the party of the first part the sum of Eighteen Hundred (1800) Dollars, together with interest [fol. 245] from the date hereof at the rate of six per centum per annum, and also by paying any sums the party of the first part may expend for taxes assessed against said property, insurance premiums, provided; however, interest is to be added on such expenditures from the date of their pay-

ment. And, it is further agreed that the party of the second part shall give the party of the first part ten days' notice, prior to the 19th day of September 1938, of their desire to redeem the property at the expiration of two years.

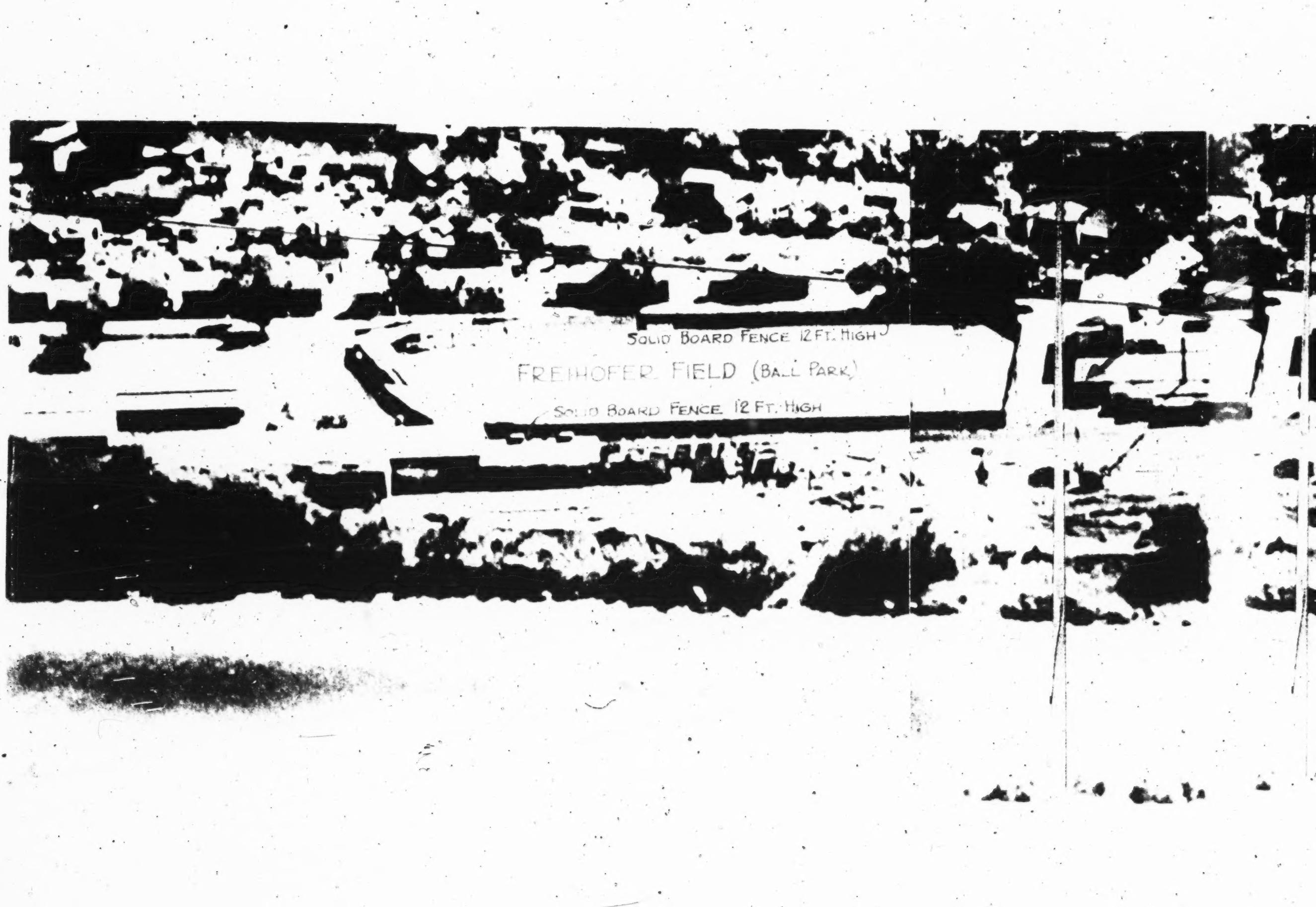
It is further agreed that the party of the second part is to have full and uninterrupted possession of the premises during the period of this agreement; and it is further agreed that, if the party of the second part shall pay to the party of the first part, interest quarterly on the aforesaid principal sum, the first interest to be due and payable on January 15, 1937, and thereafter on the Fifteenth day of April, July and October in each year; and shall also pay the taxes, keep the property in repair, pay the insurance premiums when due; that this agreement shall be extended for a further period of one year, and from year to year thereafter, subject to the approval of the party of the first part; and, if the party of the first part shall desire to discontinue this agreement, or to sell the property, they shall give the party of the second part at least thirty days' notice, in writing, prior to the fifteenth day of October, in any year, after the first two years, that they do not wish to continue the agreement; and, upon receipt of such notice and at the expiration of the said period which the notice calls, the party of the second part will pay the sums herein agreed to, and shall be entitled to receive a [fol. 246] deed for the said property; and, upon failure of their carrying out the terms of this agreement, and complying with the request, they hereby give the party of the first part, their heirs or assigns the right to reenter the said premises and to remove all persons therefrom without any other legal action being taken, hereby discharging them from any claim or right of action, or liability, or damage they may or could have against them; and, it is further agreed that the party of the second part will at all times keep the premises in proper repair and will use them for legitimate purposes only.

In witness whereof, the parties hereto interchangeably set their hands and seals the day and year first above-written.

Willis Van Gorden. (Seal.) Elizabeth Van Gorden. (Seal.) John D. Colburn. (Seal.) Bessie Colburn. (Seal.)

Signed and Sealed in the Presence of George W. Fleming.

(This agreement is not recorded.)



SOLID BOARD FENCE 12 FT. HIGH

FREIHOFER FIELD (BALL PARK)

SOLID BOARD FENCE 12 FT. HIGH

REPLATORS' EXHIBIT 1-4

(Airplane photograph showing view of North Main Street section before bridge construction.)

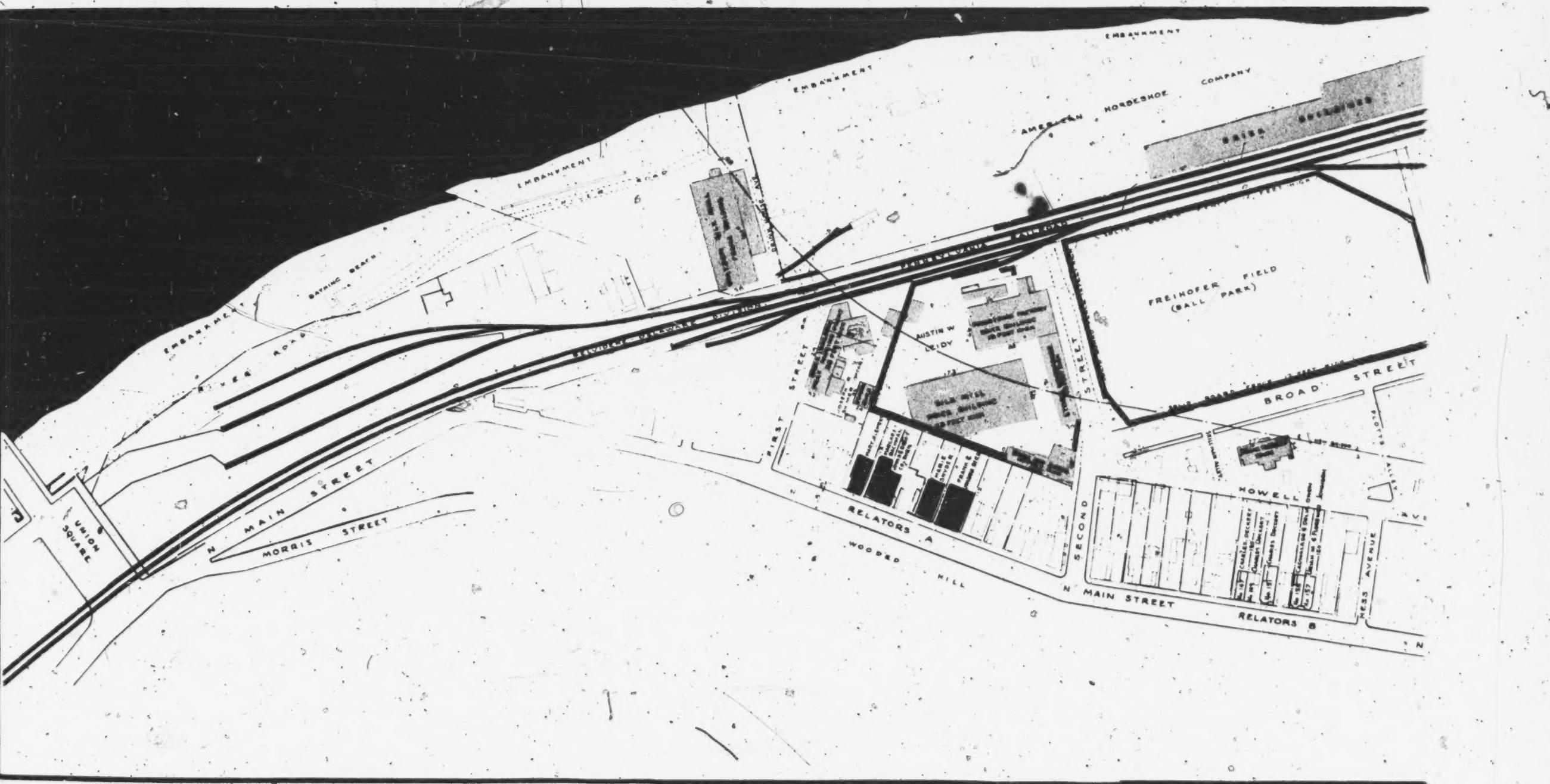




BRIDGE

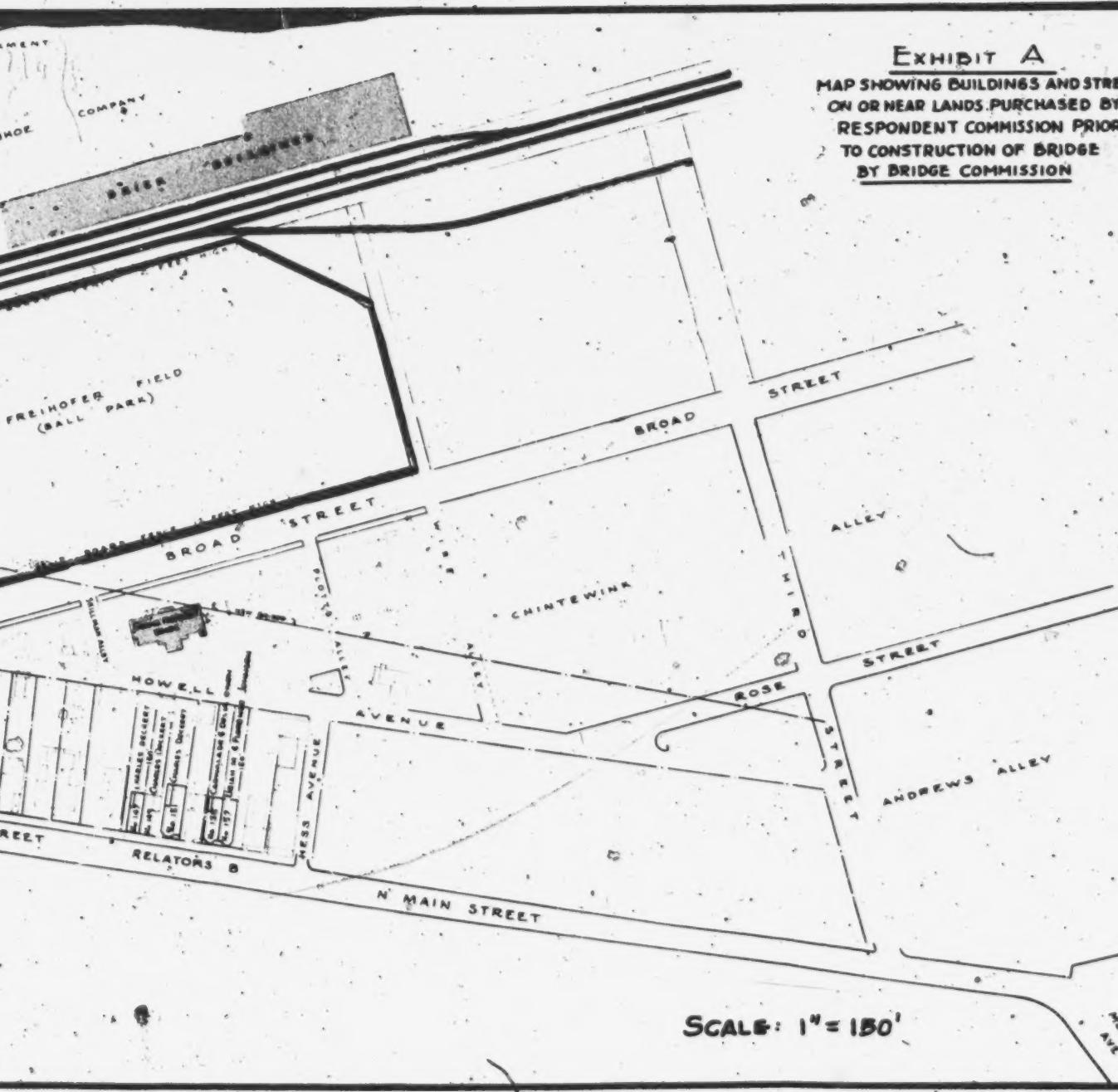
Main Street

North Main Street section before construction

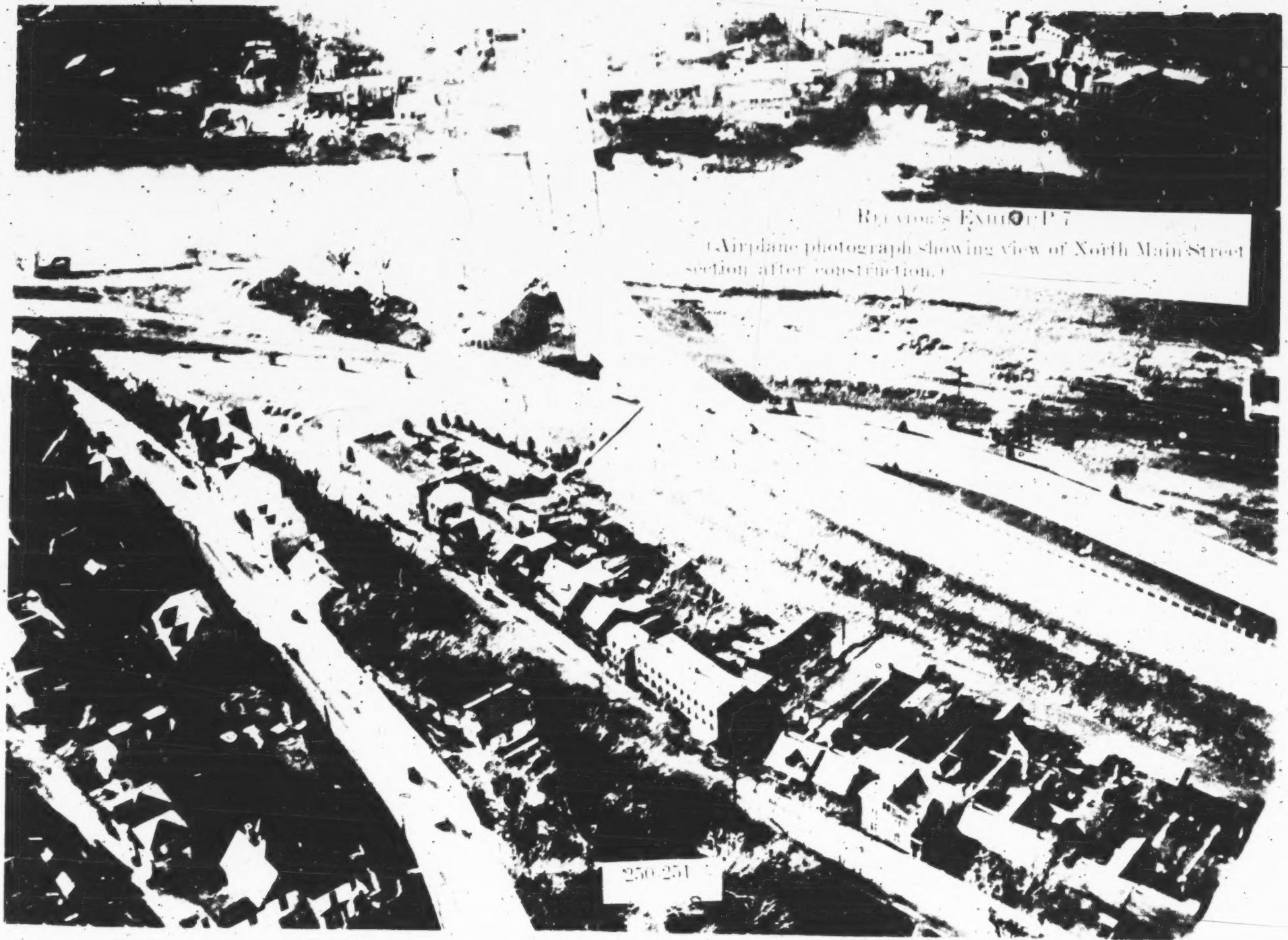


Construction

EXHIBIT A
MAP SHOWING BUILDINGS AND STREETS
ON OR NEAR LANDS PURCHASED
RESPONDENT COMMISSION PRIOR
TO CONSTRUCTION OF BRIDGE
BY BRIDGE COMMISSION



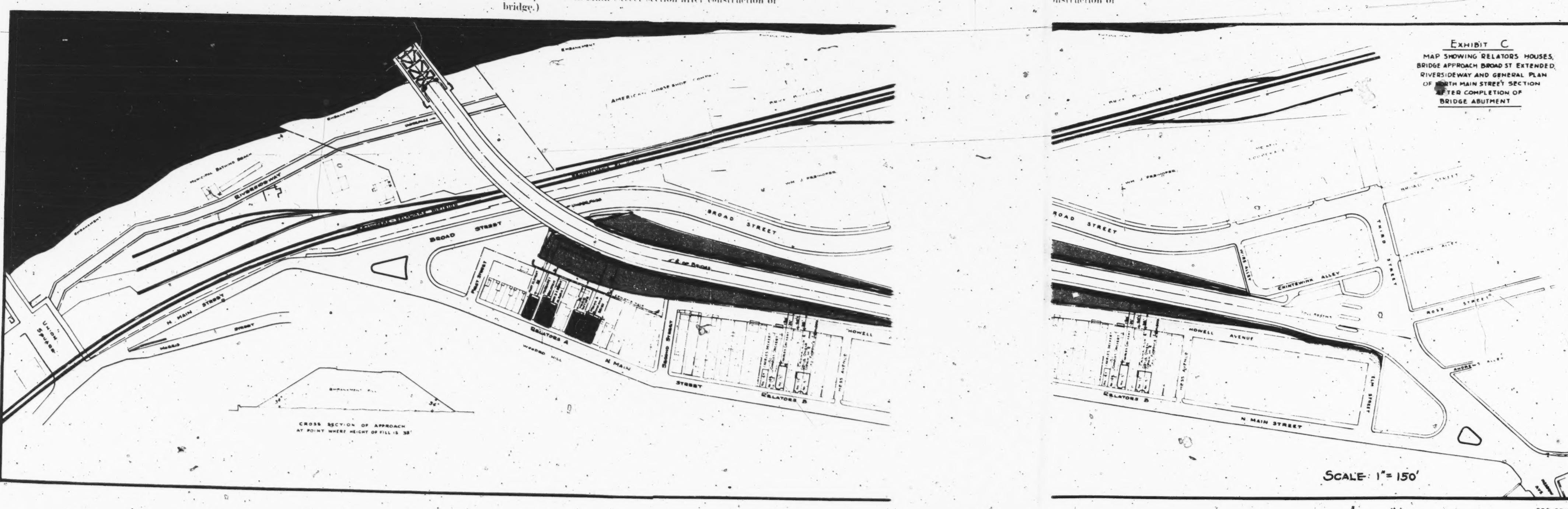
24

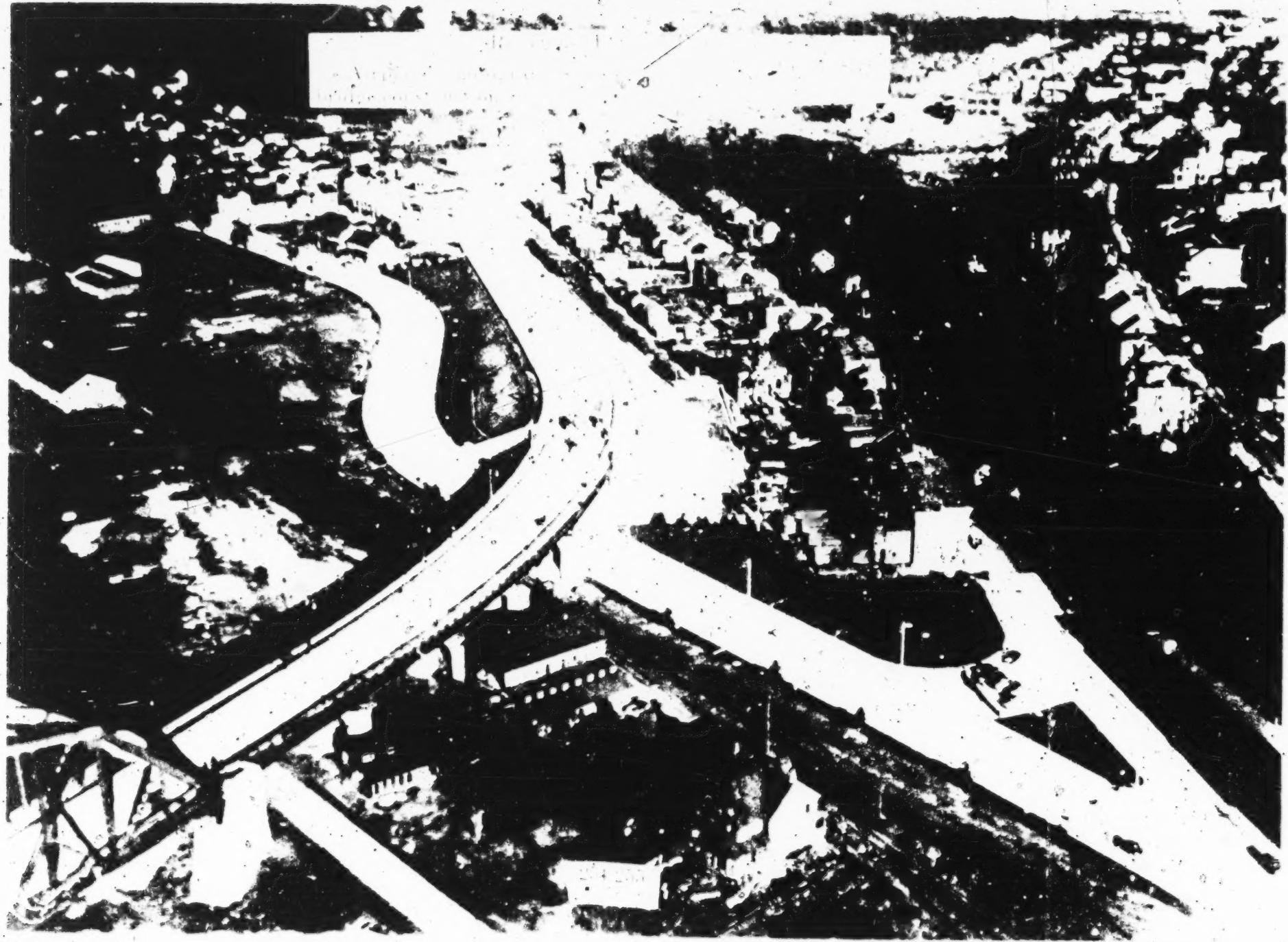


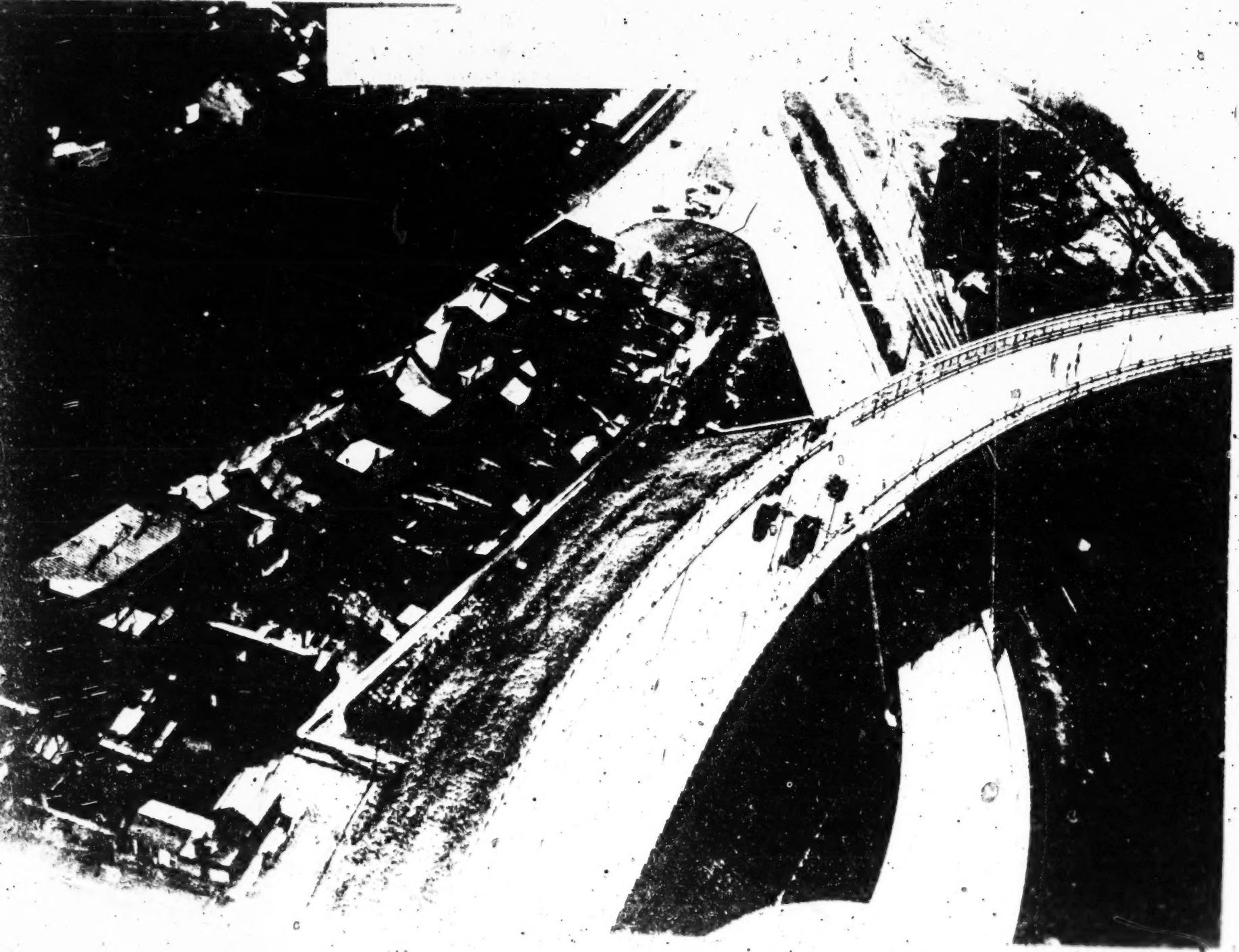
Revisor's Exhibit P-7

(Airplane photograph showing view of North Main Street section after construction.)

250-251









[fol. 258]

RELATORS' EXHIBIT P-11

(Deed from Van Gordens to Colburns)

This Indenture made the twelfth day of October, in the year of our Lord One Thousand Nine Hundred and Thirty-eight between Willis Van Gorden and Elizabeth Van Gorden, his wife, of the Township of White, in the County of Warren and State of New Jersey, hereinafter known as the grantors and John D. Colburn and Bessie Colburn, husband and wife (residing at —) of the Town of Phillipsburg, in the County of Warren and State of New Jersey, hereinafter known as the Grantees.

Witnesseth, that in consideration of the sum of one dollar and other good and valuable consideration the said grantors do grant, bargain, sell and convey, unto the said grantees their heirs and assigns, all that certain tract of land and premises situate in the Town of Phillipsburg, in the County of Warren and State of New Jersey.

Beginning on the westerly side of North Main Street at a point, the intersection of the northerly boundary of property of Margarite Bachman and the building line of North Main Street; thence extending northerly along building line of North Main Stret, twenty five (25) feet, more or less, to corner of Levi Willever; thence extending of this width in depth one hundred twelve (112) feet west to land of Claire Silk Mill Company.

Bounded on the North by land of Levi Willever, on the East by North Main Street; on the South by property of Margarite Bachman; and on the West by property of Claire Silk Mill Company.

Being the same premises which Margarite Bachman and William Bachman which by their indenture dated April 1, [fol. 259] 1887, and recorded in the County Clerk's Office for the County of Warren, in Deed Book 132, page 288 etc., did grant, bargain, and confirm unto Carrie Kiefer, her heirs and assigns.

Being same lands and premises conveyed by Carrie Kiefer, a single woman to said John D. Colburn, and Bessie Colburn, his wife, by deed dated September 30, 1919, and recorded in said Clerk's office in Deed Book 215 page 429 etc.

It is also intended to convey all rights given and received in accordance with a certain agreement dated April 29, 1927, made between John D. Colburn and Bessie Colburn, his wife,

and Adam Ciemiecki and Stanislawa Ciemiecki, husband and wife, recorded in Book 245 of Deeds, page 376 pertaining to the use of certain gas and sewer pipes affecting the house on the lands herein described.

Being same lands and premises conveyed by John D. Colburn, and Bessie Colburn, his wife, to Willis Van Gorden, and Elizabeth Van Gorden, husband and wife, by deed dated October 19, 1936, and recorded in the Warren County Clerk's Office in Deed Book 281 page 127, etc.

To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said grantees, their heirs and assigns forever.

And the said grantors for themselves, their heirs, executors and administrators, covenant with the said grantees as follows:

(1) That they are lawfully seized of the said land.

(2) That they have the right to convey the said land to the grantees.

[fol. 260] (3) That the grantees shall have quiet possession of the said lands and that the same are free from all encumbrances.

(4) That they will execute such further assurances of the said land as may be requisite.

(5) That they have done no act to encumber the said land.

(6) That they will warrant generally the property hereby conveyed.

In Witness Whereof, the said grantors have hereunto set their hands and seals the day and year above written.

Willis Van Gorden. (Seal.) Elizabeth Van Gorden.
(Seal.).

Signed, Sealed and Delivered in the Presence of
George W. Fleming, U. S. I. R. \$2.00.

STATE OF NEW JERSEY,
County of Warren, ss:

Be It Remembered, that on this twelfth day of October, in the year of our Lord one thousand nine hundred thirty-eight, before me, the subscriber, an attorney at law of New

Jersey, personally appeared Willis Van Gorden and Elizabeth Van Gorden, his wife, who I am satisfied are the grantors mentioned in the within deed, and to whom I first [fol. 261] made known the contents thereof, and thereupon they each acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

George W. Fleming, Attorney at Law of New Jersey.

(Recorded in the Warren County Clerk's office on October 13, 1938 in Book 288 of Deeds for said County, on page 557.)

RELATORS' EXHIBIT P-12

(Mortgage from Colburns to Van Gordens)

This Indenture, made this twelfth day of October, in the year of our Lord one thousand nine hundred and thirty-eight between John D. Colburn and Bessie Colburn, his wife, of the Town of Phillipsburg, in the County of Warren and State of New Jersey, Mortgagors, and Willis Van Gorden and Elizabeth Van Gorden, husband, and wife, of the Township of White, in the County of Warren and State of New Jersey, Mortgagees.

Witnesseth, that to secure the payment of an indebtedness in the sum of Eighteen Hundred Dollars lawful money of the United States of America, to be paid on the Fifteenth day of October, one thousand nine hundred and thirty-nine, with interest thereon to be computed from October 15, 1938 at the rate of six per cent per annum, and to be paid quarterly, according to a certain bond or obligation bearing even date herewith, and in consideration of the sum of one dollar, [fol. 262] the mortgagors hereby mortgage to the mortgagees all that certain tract or parcel of land and premises hereinafter particularly described situate, lying and being in the Town of Phillipsburg, in the County of Warren and State of New Jersey.

Beginning on the westerly side of North Main Street at a point, the intersection of the northerly boundary of property of Margarite Bachman and the building line of North Main Street; thence extending northerly along building line of North Main Street, twenty-five (25) feet, more or less, to corner of Levi Willever; thence extending of this width

in depth one hundred twelve (112) feet west to land of Claire Silk Mill Company.

Bounded on the North by land of Levi Willever, on the East by North Main Street; on the South by property of Margarite Bachman; and on the West by property of Claire Silk Mill Company.

Being the same premises which Margarite Bachman and William Bachman which by their indenture dated April 1, 1887, and recorded in the County Clerk's Office for the County of Warren, in Deed Book 132, page 288 etc., did grant, bargain, and confirm unto Carrie Kiefer, her heirs and assigns.

Being same lands and premises conveyed by Carrie Kiefer, a single woman to said John D. Colburn, and Bessie Colburn, his wife, by deed dated September 30, 1919, and recorded in said Clerk's office in Deed Book 215 page 429 etc.

It is also intended to convey all rights given and received in accordance with a certain agreement dated April 29, 1927, made between John D. Colburn and Bessie Colburn, his wife, and Adam Ciemiecki and Stanislawa Ciemiecki, husband [fol. 263] and wife, recorded in Book 245 of Deeds, page 376 pertaining to the use of certain gas and sewer pipes affecting the house on the lands herein described.

Being the same lands and premises conveyed by Willis Van Gorden and Elizabeth Van Gorden, his wife, to John D. Colburn and Bessie Colburn, husband and wife, by deed bearing even date herewith and about to be recorded.

The Mortgagors covenant as follows:

1. That they warrant the title to the premises,
2. That no owner of the mortgaged property shall be entitled to any credit by reason of the payment of any tax thereon,
3. That the said mortgagors will pay the indebtedness hereinbefore provided,
4. That the buildings on the premises shall be kept insured against loss by fire for the benefit of the holders hereof,
5. That the whole of the principal sum shall, at the option of the holders of the mortgage, become due after default in the payment of any instalment of principal and interest

for sixty days or after default in the payment of any tax, water rate or assessment for sixty days, or in default in keeping the buildings insured against loss by fire for the benefit of and to the satisfaction of the holders of the mortgage.

6. That the mortgagors within ten days, upon written request of the holders hereof, will furnish, at the expense of said holders, a statement of the amount due on this mortgage.

[fol. 264] 7. That no building on the premises shall be removed or demolished without the consent of the mortgagees.

8. That the mortgagors will keep the buildings on the premises in repair at all times.

In Witness Whereof, the said mortgagors have hereunto set their hands and seals the day and year first above written.

John D. Colburn. (Seal.) Bessie Colburn. (Seal.)

Signed, sealed and delivered in the presence of Bessie S. Fritts.

STATE OF NEW JERSEY,
County of Warren, ss:

Be it remembered, that on this twelfth day of October, in the year of our Lord one thousand nine hundred and thirty-eight, before me, the subscriber, a Notary Public in and for said County and State personally appeared John D. Colburn and Bessie Colburn, his wife, who I am satisfied are the mortgagors mentioned in the within indenture and to whom I first made known the contents thereof, and thereupon they each acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

Bessie S. Fritts, Notary Public of New Jersey. My commission expires January 9, 1940. (Notary Seal.)

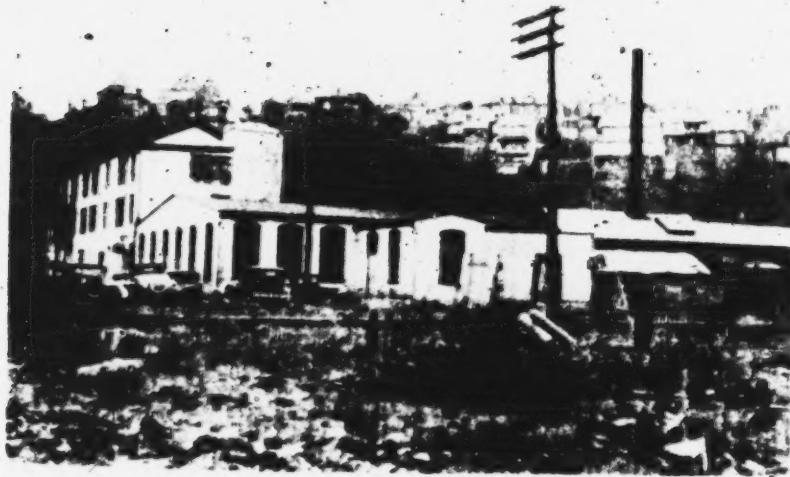
(Recorded in the Warren County Clerk's office, in Book 144 of Mortgages on page 233 on October 13, 1938.)

265

RESPONDENT'S EXHIBIT R-1
(Photograph of Leidy Warehouse.)

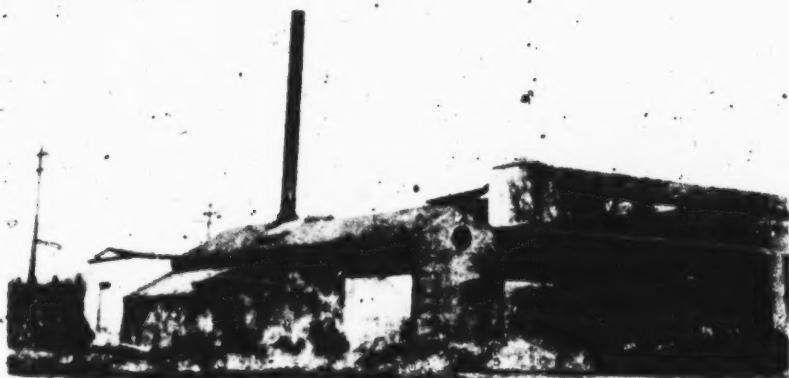


RESPONDENT'S EXHIBIT R-2
(Photograph of Pocket-book Factory on Leidy Property.)



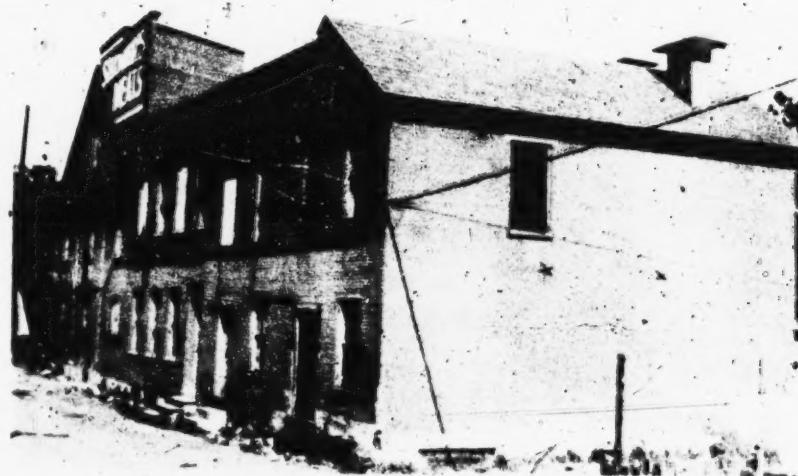
RESPONDENT'S EXHIBIT R-3

(Photograph of Boiler-room, Pocket-book Factory on
Leidy Property.)



232

RESPONDENT'S EXHIBIT R-4
(Photograph of Shimer Meat Packing Plant building.)

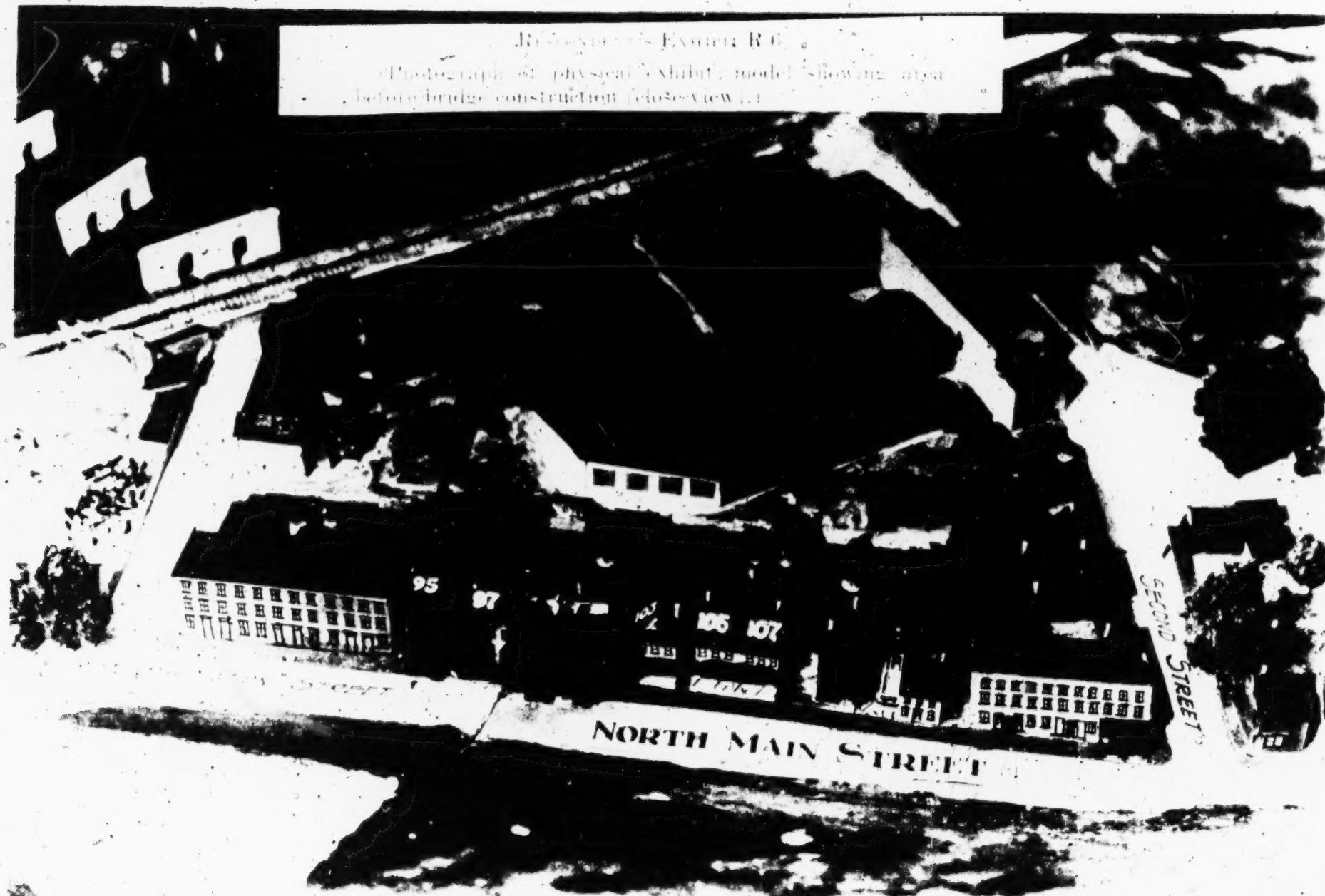


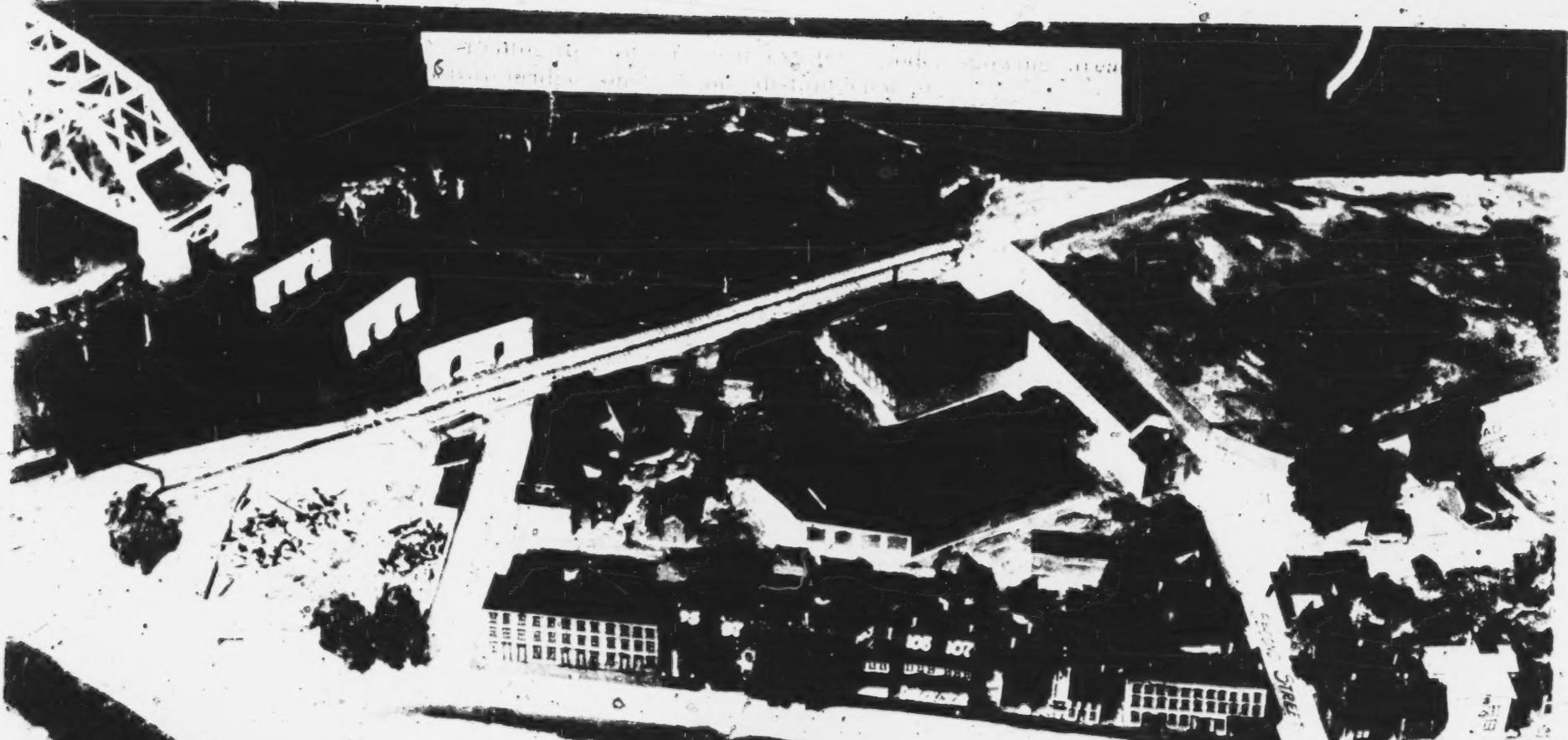
RESPONDENT'S EXHIBIT R-5.
(Photograph of Barn on Leidy Property.)



Recknagel's Exhibit R-6

Photograph of physical exhibit model showing bridge before bridge construction [close view].

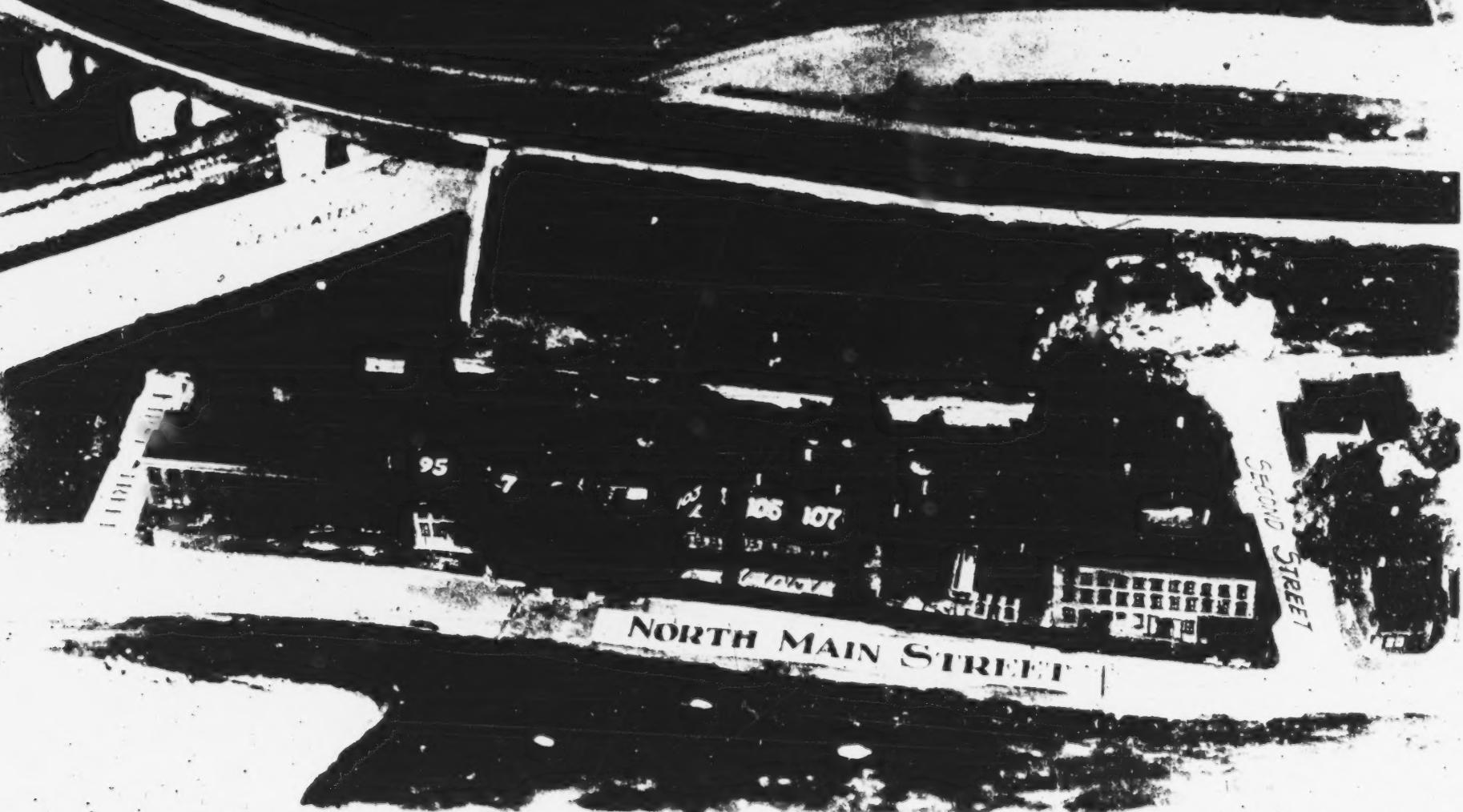


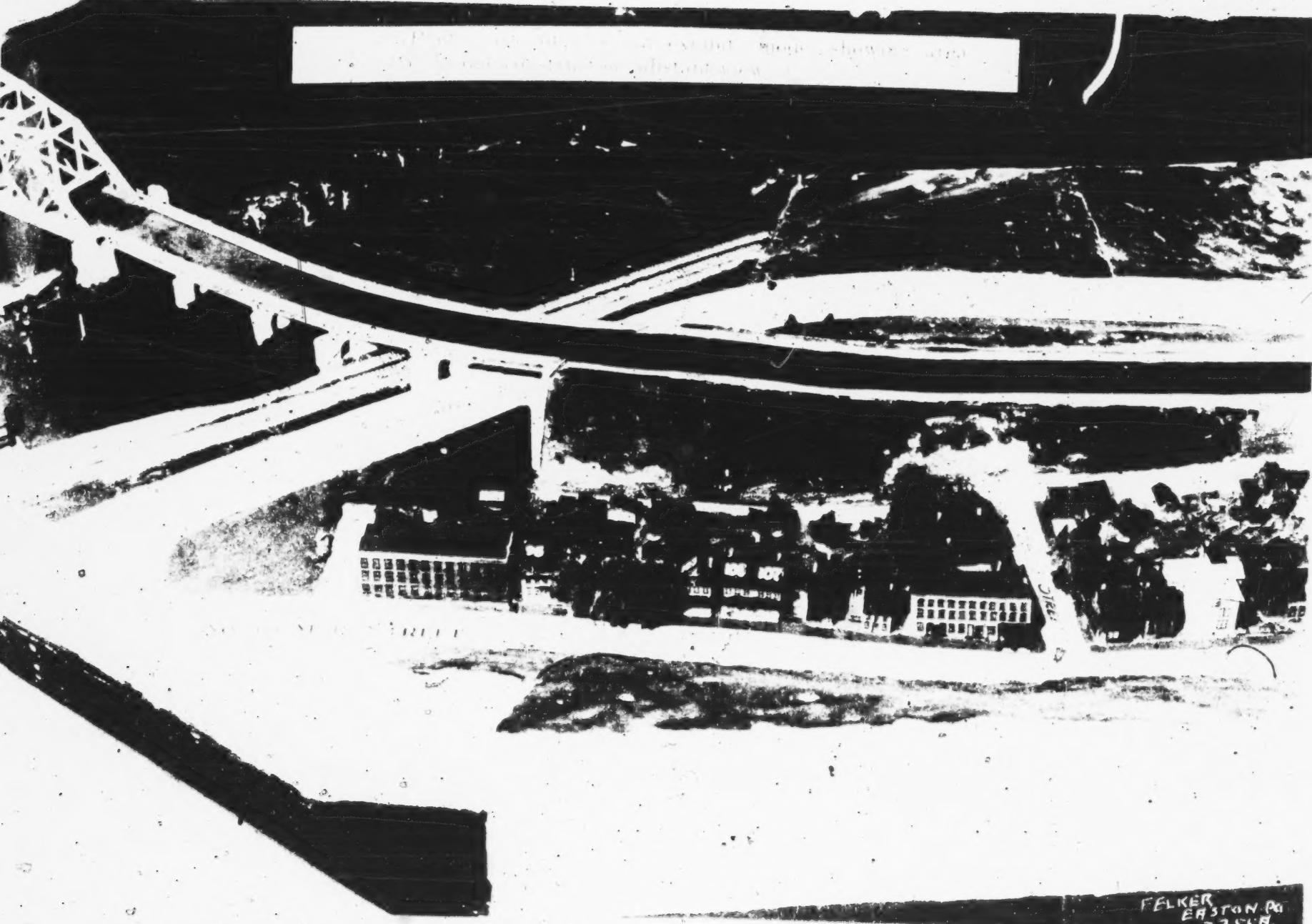


ELKTON, PA
23436

Reproduction of Exhibit R-7

Photograph of physical exhibit showing bridge under construction, falsework view.





FELKER
EASTON, PA
7356R

207

RESPONDENT'S EXHIBIT R-8

(Photograph of Silk Mill on Leidy Property.)



RESPONDENT'S EXHIBIT R-9

(Photograph of Brick Garage on Leidy Property.)



[fol. 278] NEW JERSEY COURT OF ERRORS AND APPEALS, MAY TERM, 1939

No. 5.

JOHN D. COLBURN, et als., Relators-Respondents,

vs.

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION,
Respondent-Appellant

Argued May 16th, 1939. Decided Sep. 22, 1939

1. Held, under R. S. 32:8-4 et seq., respondents were entitled to be compensated for damage to their lands by reason of the erection of a bridge and abutments by the appellant, notwithstanding the fact that no part of their lands were actually taken by the appellant.
2. Held, the statute is broad enough to require anyone having an interest in lands to be compensated for his damage and is not limited to the holder of title to the lands.
3. Held, it was not harmful error to permit evidence of the value of the lands at the trial where the issue to be determined was whether or not there had been damage to the lands.

On appeal from a judgment of the Supreme Court.

For the appellant: John H. Pursel, Esq., and Edward P. Stout, Esq.

For the respondents: Robert B. Meyner, Esq.,

The opinion of the Court was delivered by DONGES, J.:

This appeal is from a judgment of the Supreme Court allowing a writ of Mandamus. It brings up the question of the right of the relators to have damages assessed for alleged injury to their property by reason of the construction of the Phillipsburg-Easton bridge under the control and supervision of the Delaware River Joint Toll Bridge Commission. This Commission was created by Chapter 297 of the Laws of 1912.

The relators have property in the vicinity of the abutments and approaches of the bridge. None of their property was actually taken. Their claim is for con-

[fol. 279]

sequential damage by the closing of streets and by the obstruction of view and limitation of light and air by the construction of the abutments and approaches.

In the opinion of Mr. Justice Parker it is pointed out that under the law of New Jersey there could be no recovery for these consequential damages, in the absence of some statute. It appears, however, that the Act of 1912, as amended, now R. S. 32:9-1 et seq., an act which purports to be a joint act of the State of Pennsylvania and the State of New Jersey, acting through their several legislatures, provides for the payment of damages for injuries alleged to be suffered. In 32:8-4 the power of condemnation and matters relating thereto are dealt with and the term "real property" is defined as follows:

"The term 'real property' as used in this compact includes lands, structures, franchises, and interests in land, including lands under water and riparian rights, and any and all things and rights usually included within the said term, and includes not only fees simple and absolute, but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses, and all other incorporated (incorporeal) hereditaments and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate."

It will be noted that the very last provision is "claims for damage to real estate." In 32:9-1 et seq. the method of acquisition is provided for, and in 32:9-7 it is provided that:

"The joint commission, having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of the property taken, including any easements, rights or franchises incident thereto as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable."

This latter language follows the constitution of Pennsylvania, adopted in 1874, section 8 of article 16, which provides: -

[fol. 280] "Municipal and other corporations and individuals invested with the privilege of taking private property

for public use shall make just compensation for property taken, injured or destroyed by the construction, enlargement of their works, highways, and improvements, which compensation shall be paid before such taking, injury or destruction."

In Chester County vs. Brower, 12 Atl. 577, the Supreme Court of Pennsylvania held that this constitutional provision covered injury by the construction of abutments of a bridge fourteen feet above the grade of the street in front of plaintiff's house. And in Pennsylvania Railroad vs. Miller, 132 U. S. 75, 33 Law. Ed. 267, the United States Supreme Court dealt with the same constitutional provision in a case growing out of the construction of the abutments and piers by the railroad from its Broad St. Station to the Schuylkill River, and held that compensation for the construction of the piers adjacent to the lands of the complainant property owner should be paid under the Pennsylvania constitution.

Our eminent domain act provides only for proceedings to determine the amount of damages where lands are actually taken. In the instant case, the language used in the act following that found in the constitution of Pennsylvania, which has had judicial interpretation, it appears to be reasonable to follow such interpretation and to hold, as did the Supreme Court, that by the use of the language it was intended to award to persons whose property might be injured consequential damages for such injury.

It is further complained that it was error to award mandamus because the relators did not have title to the lands, but the act is very broad and permits anyone having any character of interest to have his damages awarded.

The appellant also alleges that it was error to permit at the trial testimony as to the value of the lands. No injury was done with respect to this, because the duty now devolves [fol. 281] upon the commission to determine the extent of the consequential damages, and it fixes the sums due with an appeal under the eminent domain act (omitting the appointment of commissioners in condemnation) as provided in that act.

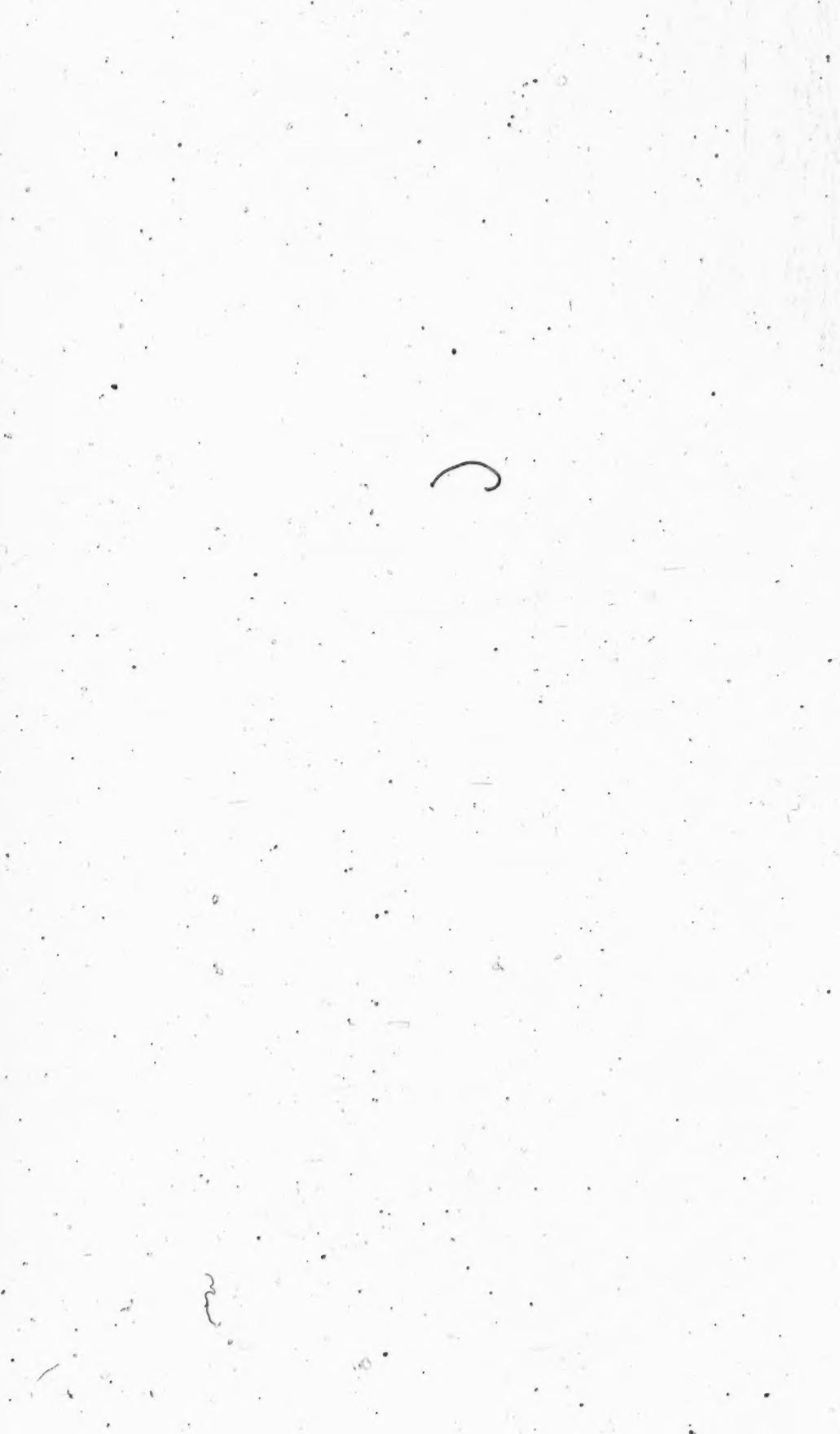
The judgment under review is affirmed.

Endorsed: "Filed Sep. 22, 1939. Thomas A. Mathis,
Clerk."

212

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(Here follows 1 photolithograph, side folio 282)



Dec. No.12997.....

STATE OF NEW JERSEY

COURT OF ERRORS AND APPEALS

May Term, 1939

Appeal from Supreme Court
of New Jersey

John D. Colburn, et al.,

Respondents,

and

Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, Appellant.

No. 5 of May Term, 1939

Date Sep 22, 1939

The Chancellor presiding.

Opinion by Donges, J.

CHECK LIST	Affirm	Reverse	Modify
The Chancellor	1		
" XMMX XMMXX		1	
Mr. Justice MMXXK			
" " MMXX			
" Case	1		
" Bodine	1		
" Donges	1		
" Heher	1		
" Perskie	1		
" Porter	1		
Judge Hetfield	1		
" Dear	1		
" Wells	1		
" WolfsKell	1		
" Rafferty	1		
" Hague	1		
Totals			

ENDORSED:
"FILED SEP 22, 1939,
THOMAS A. MATHIS,
CLERK."

[fol. 283] NEW JERSEY COURT OF ERRORS AND APPEALS

JOHN D. COLBURN, et als., Relators-Respondents,
vs.

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION,
Respondent-Appellant

On Appeal from the Supreme Court.

On Mandamus, etc., Remittitur.

This cause having been duly argued at the May term, 1939, of this Court, by John H. Pursel, Esquire, and Edward P. Stout, Esquire, of counsel for the appellant, and Robert B. Meyner, of counsel for the respondents, and the Court having considered the same, and finding no error in the record or the proceedings in this Court:

It is thereupon on this 22nd day of September, 1939, Ordered and Adjudged that the judgment of the Supreme Court removed by the appellant in this cause be affirmed with costs, and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said Court.

On motion of _____.

Robert B. Meyner, Attorney and counsel for Respondents.

A true copy.

Thomas A. Mathis, Register.

[fol. 284] Endorsed: New Jersey Court of Errors and Appeals. John D. Colburn, et als., Relators-Respondents, vs. Delaware River Joint Toll Bridge Commission, Respondent-Appellant. On Appeal from The Supreme Court. On Mandamus, etc. Remittitur. Endorsed: "Filed Oct. 3, 1939, Thomas A. Mathis, Clerk."

214

283

(Here follows 1 photolithograph, side folio 285)

(4852)

State of New Jersey



COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

I, THOMAS A. MATHIS, Secretary of State of the State of New Jersey and Ex-Officio Clerk of the Court of Errors and Appeals, DO HEREBY CERTIFY, that the annexed is a true transcript of the record, opinion, checklist and remittitur in the case of:

John D. Colburn and Bessie Colburn,

Relators-Respondents,

vs.

Delaware River Joint Toll Bridge Commission, Pennsylvania, New Jersey,

Respondent-Appellant

as taken from and compared with the originals on file in my office.

COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

I, THOMAS A. MATHIS, Secretary of State of the State of New Jersey and Ex-Officio Clerk of the Court of Errors and Appeals, DO HEREBY CERTIFY, that the annexed is a true transcript of the record, opinion, checklist and remittitur in the case of:

John D. Colburn and Bessie
Colburn,

Relators-Respondents,

vs.

Delaware River Joint Toll Bridge
Commission, Pennsylvania, New
Jersey,

Respondent-Appellant

as taken from and compared with the originals on file in my office.

WITNESS my hand and seal
of this Court, this seven-
teenth day of November,
A. D., 1939.


Thomas Mathis
CLERK.

[fol. 286] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 15, 1940

The petition herein for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey is granted, and the case is assigned for argument immediately following No. —; Original, Commonwealth of Pennsylvania v. State of New Jersey, et al. The Court directs the attention of counsel to the question of the jurisdiction of this Court.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 43970 New Jersey, Court of Errors and Appeals, Term No. 563. Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, Petitioner, vs. John D. Colburn and Bessie Colburn. Petition for writ of certiorari and exhibit thereto. Filed November 30, 1939. Term No. 563 O. T. 1939.

(6125)

~~RECOPY~~

20
FEB 1939
SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 563

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION, PENNSYLVANIA-NEW JERSEY,

Petitioner,

vs.

JOHN D. COLBURN AND BESSIE COLBURN.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF ERRORS AND APPEALS OF THE
STATE OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF

EDWARD P. STOUT,
Counsel for Petitioner.

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<i>Newark v. Hatt</i> , 79 N. J. L. 548	24
<i>Pennsylvania v. Wheeling & Belmont Bridge Company</i> , 13 Howard 518	20
<i>Pennsylvania Railroad v. Lippincott</i> , 116 Pa. 472	25
<i>Pennsylvania Railroad Company v. Marchant</i> , 119 Pa. 541, aff. 153 U. S. 380	25
<i>Pennsylvania Railroad v. Miller</i> , 132 U. S. 75	25
<i>R. & A. Realty Corporation v. Pennsylvania Railroad Company</i> , 16 N. J. Misc. Reps. 537	24
<i>In re Soldiers and Sailors Memorial Bridge, etc., in the City of Harrisburg</i> , 308 Pa. 487	25
<i>Westmoreland C. & C. Co. v. Public Service Commission</i> , 294 Pa. 451	25
<i>Wheeling & B. B. Co. v. Wheeling Bridge Co.</i> , 138 U. S. 287	23

CONSTITUTIONAL PROVISIONS CITED.

United States, Art. I, Sec. X (2)	2, 20
New Jersey, Art. I, Sec. 16	24
Pennsylvania, Art. 16, Sec. 8	24

STATUTES CITED.

United States:

1935, Public—No. 411—74th Congress	2
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New Jersey:

P. L. 1912, C. 297	4, 5, 20
P. L. 1919, C. 76	4
P. L. 1934, C. 215	2
R. S. 1937, 32:8-1 et seq.	4
R. S. 1937, 32:9-1 et seq.	4

Pennsylvania:

1931, Act No. 332, P. L. 1252	2
1933, Act No. 138, P. L. 1827	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 563

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION,
PENNSYLVANIA-NEW JERSEY,

Petitioner,

vs.

JOHN D. COLBURN AND BESSIE COLBURN.

**PETITION FOR WRIT OF CERTIORARI TO THE
NEW JERSEY COURT OF ERRORS AND APPEALS**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

The Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, a body corporate and politic created and organized pursuant to a compact between the Commonwealth of Pennsylvania and the State of New Jersey, respectfully presents this petition for a writ of certiorari to review the final judgment of the New Jersey Court of Errors and Appeals, the highest Court of the State of New Jersey in which a decision in the above entitled cause could be had, rendered September 22nd, 1939 (R. 282).

Statement of the Case

On June 25th, 1931, the Legislature of the Commonwealth of Pennsylvania enacted a statute (Act No. 332, P. L. 1352) authorizing the Governor of the Commonwealth of Pennsylvania to enter into a compact or agreement with the State of New Jersey to create the Delaware River Joint Toll Bridge Commission as a body corporate and politic and defining its powers and duties, which statute was amended in certain respects on May 18th, 1933 (Act No. 138, P. L. 1827), and on June 11th, 1934 the Legislature of the State of New Jersey enacted a statute (P. L. 1934, C. 215) of the same import as the Pennsylvania statute as amended, authorizing the Governor of the State of New Jersey to enter into said compact or agreement with the Commonwealth of Pennsylvania.

Pursuant to the legislative authority, a compact was entered into between the Commonwealth of Pennsylvania and the State of New Jersey, which was signed by the Governor of New Jersey on December 18th, 1934, and by the Governor of Pennsylvania on December 19th, 1934, and which compact was assented to by Congress by Act approved August 30th, 1935 (Public—No. 411—74th Congress), such assent being a requisite to its validity under Art. I, Sec. X (2) of the Federal Constitution. A copy of the said compact is annexed hereto and made a part hereof.

In accordance with the powers conferred and the duties imposed by the compact, your petitioner undertook to build the bridge across the Delaware River from Phillipsburg, New Jersey, to Easton, Pennsylvania, and acquired by purchase and not by condemnation certain lands in the Town of Phillipsburg, and constructed thereon the New Jersey portion of said bridge and its approach.

John D. Colburn and Bessie Colburn (respondents herein), asserting that they were the owners of lands in

Phillipsburg adjacent, to the rear, to the lands acquired by your petitioner, and upon which the bridge was built, made a claim against your petitioner for damages for depriving them of air, light and view, and curtailing their access, by reason of the construction of the bridge and its approach (R. 21; 22).

None of the Colburns' lands or street access thereto were taken, and they conceded that they had no claim for damages against your petitioner, unless a right in their favor had been created by the compact (R. 23).

Your petitioner refused to allow the Colburns' claim for damages, upon the ground that their damages, if any, were *damnum absque injuria*, and that under the compact they were not entitled to damages.

The Colburns then applied to the New Jersey Supreme Court for an alternative writ of mandamus against your petitioner, and on March 18, 1938, the New Jersey Supreme Court filed an opinion that an alternative writ of mandamus should issue (R. 13), and on May 19, 1938, the alternative writ of mandamus was issued (R. 20).

Thereafter, the mandamus suit was prosecuted and a trial was had at Circuit, which resulted in a *postea* (R. 35), and on December 17, 1938, the New Jersey Supreme Court entered a final judgment (R. 43) thereon in favor of John D. Colburn and Bessie Colburn and against your petitioner, directing the issuance of a peremptory writ of mandamus commanding your petitioner to pay to John D. Colburn and Bessie Colburn, by agreement if possible, an amount equal to the extent to which the value of their property had been diminished by reason of the building of a bridge abutment to the rear of their lands; and upon failing to agree in that regard, to institute, prosecute and consummate proceedings for the determination of the amount to be awarded to them as compensation for the damages by them sustained from the injury to their land, pursuant to

the provisions of Chapter 215 of the Laws of 1934 (R. S. 1937, 32:8-1, *et seq.*), providing for proceedings according to Chapter 297 of P. L. 1912, as amended by Chapter 76 of P. L. 1919 (R. S. 1937, 32:9-1, *et seq.*) (R. 46).

Your petitioner appealed from the judgment of the New Jersey Supreme Court awarding a peremptory writ of mandamus to the New Jersey Court of Errors and Appeals, the highest court of New Jersey having jurisdiction of the matter, which Court, upon an opinion filed September 22, 1939, affirmed the judgment of the New Jersey Supreme Court, and a judgment of affirmance was entered on September 22, 1939, which is the judgment here sought to be reviewed.

Both the Supreme Court of New Jersey (R. 17) and the Court of Errors and Appeals of New Jersey (R. 278) held that the compact created a new right in favor of the Colburns to damages in law, and that except for the compact they would have no right to damages; while in Pennsylvania under the decisions of its Courts, an owner whose lands were similarly situated would have no right to damages.

The compact (Art. III) only authorizes your petitioner to acquire or take "real property," as that term is defined therein. The definition should not be construed as imposing upon your petitioner the duty to pay damages for real property not taken. The expression "claims for damage to real estate," as included in the definition in the compact, is a grant of permission to the Commission, in connection with the condemnation of land, to acquire all interests of every kind which any person may have therein, including existing claims by the owner against third parties for damages to his land. Nowhere in the compact is there any provision which should be construed as imposing upon the Commission the duty to pay consequential damages for injuries to real estate not taken.

Your petitioner, therefore, alleges that the New Jersey Courts were in error in determining that the compact did

impose upon your petitioner the duty to pay consequential damages for injuries to real estate not taken.

Your petitioner further alleges that the New Jersey Courts were in error in holding that the New Jersey Act of April 1, 1912 (P. L. 1912, C: 297), authorizing the predecessor of the present Bridge Commission (your petitioner) in acquiring existing toll bridges over the Delaware River, after view, to estimate the value of the property taken "as well as the damages for property taken, injured or destroyed," imposed a duty upon your petitioner to pay consequential damages, because this forms no part of the compact, the reference in the compact being for the very limited purpose of providing an additional method of acquiring property by the exercise of the power of eminent domain. By the compact the taking may be by eminent domain proceedings under the respective general Eminent Domain Acts of the respective States, or "in the manner provided by" the New Jersey Act of 1912, which related only to the acquisition of existing bridges and required awards therefor to be determined before the taking, and did not authorize or contemplate the construction of new bridges.

Question Presented

Under the compact between Pennsylvania and New Jersey, did respondents, in respect to their real property, none of which or street access thereto were taken by petitioner, have a right to consequential damages by the obstruction of view and limitation of light and air, and by the closing of streets in the acquisition of land and the building of the bridge by petitioner?

Reasons for the Petition

The reasons for which this petition is presented are:

1. The highest court of New Jersey has rendered a decision where is drawn in question the construction of a com-

pact between the Commonwealth of Pennsylvania and the State of New Jersey.

2. The construction of a compact between states is a Federal question which can only be finally disposed of by this Court.

3. The compact is a contract or agreement which can only be finally construed under Federal Law.

4. Neither the courts of Pennsylvania nor of New Jersey can finally determine the question of construction of the compact.

5. The construction given to the compact by the New Jersey Court of Errors and Appeals is erroneous in that the Court held that the compact created a right to consequential damages by the obstruction of view and limitation of light and air, and by the closing of streets in the acquisition of land and the building of the bridge by petitioner, whereas a true construction of the compact should be to the contrary.

6. The Commonwealth of Pennsylvania, as a party to the compact, has signified that it does not agree with the construction placed upon the compact by the New Jersey Court of Errors and Appeals, and petitioner, as a body corporate and politic created by the compact between Pennsylvania and New Jersey is in duty bound to secure, if possible, a final and conclusive determination by this Court as to the meaning and application of the compact in respect to claims for damages by land owners whose real property and street access thereto are not taken, and whose only claim is for consequential damages by the obstruction of view and limitation of light and air, and by the closing of streets in the acquisition of land and the building of the bridge by petitioner.

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue to the New Jersey Court of Errors and Appeals, and submits hereto the annexed brief in support of its petition.

Respectfully submitted,

EDWARD P. STOUT,
Attorney for Petitioner.

**AGREEMENT BETWEEN THE COMMONWEALTH
OF PENNSYLVANIA AND THE STATE
OF NEW JERSEY**

**Creating the Delaware River Joint Toll Bridge Commission
as a body corporate and politic and defining
its powers and duties**

Whereas, The commission, on behalf of the Commonwealth of Pennsylvania, existing by virtue of the act, approved the eighth day of May, one thousand nine hundred and nineteen (Pamphlet Laws, one hundred forty-eight), and its supplements and amendments, and the commission, on behalf of the State of New Jersey, existing by virtue of the provisions of the act, approved the first day of April, one thousand nine hundred and twelve (Chapter, two hundred ninety-seven), and its supplements and amendments, acting as a joint commission, have acquired various toll bridges over the Delaware River between the Commonwealth of Pennsylvania and the State of New Jersey; and

Whereas, Additional bridge facilities between the two States will be required in the future for the accommodation of the public and the development of both States; and

Whereas, Such additional bridge facilities should be developed without the expenditure of large sums from the public revenues; and

Whereas, It is highly desirable that there be a single agency for both States empowered to further the transportation interests of these States with respect to that part of the Delaware River north of the stone arch bridge of the Pennsylvania Railroad, from Morrisville to Trenton; now therefore,

The Commonwealth of Pennsylvania and the State of New Jersey do hereby solemnly covenant and agree, each with the other, as follows:

ARTICLE I.

There is hereby created a body corporate and politic, to be known as the Delaware River Joint Toll Bridge Commission (hereinafter in this agreement called the "Commission")

sion"), which shall consist of the commissioners, on behalf of the Commonwealth of Pennsylvania, provided for by the act, approved the eighth day of May, one thousand nine hundred and nineteen (Pamphlet Laws, one hundred forty-eight), and its supplements and amendments, for the acquisition of toll bridges over the Delaware River, and of commissioners, on behalf of the State of New Jersey, provided for by the act, approved the first day of April, one thousand nine hundred and twelve (Chapter, two hundred ninety-seven), and its supplements and amendments, for the acquisition of toll bridges over the Delaware River, which said commissions have heretofore been acting as a joint commission by virtue of reciprocal legislation.

No action of the commission shall be binding unless a majority of the members of the commission from Pennsylvania and a majority of the members of the commission from New Jersey shall vote in favor thereof.

The commission shall constitute the public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey for the following public purposes, and shall be deemed to be exercising an essential governmental function in effectuating such purpose, to wit:

- (a) The administration, operation, and maintenance of the joint State-owned bridges across the Delaware River between the Commonwealth of Pennsylvania and the State of New Jersey, and located north of the present stone arch bridge of the Pennsylvania Railroad across the Delaware River from Morrisville to Trenton;
- (b) The investigation of the necessity for additional bridge communications over the Delaware River north of the said railroad bridge, and the making of such studies, surveys, and estimates as may be necessary to determine the feasibility and cost of such additional bridge communications;
- (c) The preparation of plans and specifications for, and location, construction, administration, operation and maintenance of, such additional bridge communications over the Delaware River, north of the aforesaid railroad bridge, as the commission deems necessary to advance the interests

of the two States and to facilitate public travel; and the issuance of bonds and obligations to provide moneys sufficient for the construction of such bridges; and the collection of tolls, rentals, and charges for the redemption of such bonds and obligations, and the payment of interest thereon;

(d) The procurement from the Government of the United States of any consents which may be requisite to enable any project within its powers to be carried out.

ARTICLE II.

For the effectuation of its authorized purposes, the commission is hereby granted the following powers:

- (a) To have perpetual succession.
- (b) To sue and be sued.
- (c) To adopt and use an official seal.
- (d) To elect a chairman, vice-chairman, secretary and treasurer, and appoint an engineer. The secretary, treasurer, and engineer need not be members of the commission.
- (e) To adopt suitable by-laws for the management of its affairs.
- (f) To appoint such other officers, agents and employes as it may require for the performance of its duties.
- (g) To determine the qualifications and duties of its appointees, and to fix their compensation.
- (h) To enter into contracts.
- (i) To acquire, own, hire, use, operate, and dispose of personal property.
- (j) To acquire, own, use, lease, operate, and dispose of real property and interest in real property, and to make improvements thereon.
- (k) To grant the use of, by franchise, lease, and otherwise, and to make and collect charges for the use of, any property or facility owned or controlled by it.

(l) To borrow money upon its bonds or other obligations, either with or without security.

(m) To exercise the power of eminent domain.

(n) To determine the exact location, system, and character of, and all other matters in connection with, any and all improvements or facilities which it may be authorized to own, construct, establish, effectuate, maintain, operate or control.

(o) In addition to the foregoing powers, to exercise the powers, duties, authority and jurisdiction heretofore conferred and imposed upon the aforesaid commissions, hereby constituted a joint commission by reciprocal legislation of the Commonwealth of Pennsylvania and the State of New Jersey, with respect to the acquisition of toll bridges over the Delaware River, the management, operation and maintenance of such bridges, and the location, construction, operation and maintenance of additional bridge communications over the Delaware River north of the aforesaid railroad bridge of the Pennsylvania Railroad.

(p) To exercise all other powers, not inconsistent with the Constitutions of the State of Pennsylvania and New Jersey or of the United States, which may be reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the foregoing powers, except the power to levy taxes or assessments for benefits; and generally to exercise, in connection with its property and affairs and in connection with property under its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.

ARTICLE III.

If for any of its authorized purposes (including temporary purposes), the commission shall find it necessary or convenient to acquire for public use any real property in the Commonwealth of Pennsylvania or the State of New Jersey, whether for immediate or future use, the commission may, by resolution, determine to acquire such property by a fee simple absolute or a lesser interest, and the

said determination shall not be affected by the fact that such property has theretofore been taken for or is then devoted to a public use, but the public use in the hands or under the control of the commission shall be deemed superior to the public use in the hands or under the control of any other person, association, or corporation.

If the commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property, in the Commonwealth of Pennsylvania, for any reason whatsoever, then the commission may acquire such real property by the exercise of the right of eminent domain, in the manner provided by the act, approved the eighth day of May, one thousand nine hundred and nineteen (Paniplet Laws, one hundred forty-eight), entitled "An act providing for the joint acquisition and maintenance by the Commonwealth of Pennsylvania and the State of New Jersey of certain toll bridges over the Delaware River," and the acts amendatory thereto and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River.

If the commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property, in the State of New Jersey, for any reason whatsoever, then the commission may acquire such property by the exercise of the right of eminent domain, in the manner provided by the act of the State of New Jersey, entitled "An act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware River; and providing for free travel across the same," approved the first day of April, on thousand nine hundred and twelve (Chapter, two hundred ninety-seven), and the various acts amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River.

The power of the commission to acquire real property by condemnation or the exercise of the power of eminent domain in the Commonwealth of Pennsylvania and the State of New Jersey shall be a continuing power and no exercise thereof shall be deemed to exhaust it.

The commission and its duly authorized agents and employees may enter upon any land, in the Commonwealth or the State of New Jersey, for the purpose of making such surveys, maps, or other examinations thereof, as it may deem necessary or convenient for its authorized purposes.

However, anything to the contrary contained in this compact notwithstanding, no property, now or hereafter vested in or held by any county, city, borough, village, township or other municipality, shall be taken by the commission without the consent of such municipality, unless expressly authorized so to do by the Commonwealth or State in which such municipality is located. All counties, cities, boroughs, villages, townships and other municipalities, and all public agencies and commissions of the Commonwealth of Pennsylvania and the State of New Jersey, notwithstanding any contrary provision of law, are hereby authorized and empowered to grant and convey to the commission upon its request, but not otherwise, upon reasonable terms and conditions, any real property which may be necessary or convenient to the effectuation of its authorized purposes, including real property already devoted to public use.

The Commonwealth of Pennsylvania and the State of New Jersey hereby consent to the use and occupation by the commission of any real property of the said two States, or of either of them, which may be or become necessary or convenient to the effectuation of the authorized purposes of the commission, including lands lying under water and lands already devoted to public use.

The term "real property," as used in this compact, includes lands, structures, franchises, and interests in land, including lands under water and riparian rights, and any and all things and rights usually included within the said term, and includes not only fees simple and absolute but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses, and all other incorporeal hereditaments, and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate.

ARTICLE IV.

Notwithstanding any provision of this agreements, the commission shall have no power to pledge the credit of the Commonwealth of Pennsylvania, or of the State of New Jersey, or of any county, city, borough, village, township and other municipality of said Commonwealth or State, or to create any debt against said Commonwealth or State or any such municipality.

ARTICLE V.

The commission is hereby authorized to make and enforce such rules and regulations, and to establish, levy and collect (or to authorize, by contract, franchise, liens or otherwise, the establishment, levying and collection of) such tolls, rates, rents, and other charges, in connection with any such bridge across the Delaware River which it may hereafter construct and operate, as it may deem necessary, proper, desirable and reasonable, which tolls, rates, rents, and other charges shall be at least sufficient to meet interest and sinking fund charges on bonds and obligations issued by the commission, the maintenance of such bridge, and the administrative expenses of the commission properly chargeable to such bridge. The commission is hereby authorized and empowered to pledge such tolls, rates, rents, and other revenues, or any part thereof, as security for the repayment, with interest, of any moneys borrowed by it or advanced to it for any of its authorized purposes, and as security for the satisfaction of any other obligation assumed by it in connection with such loans or advances.

ARTICLE VI.

The Commonwealth of Pennsylvania and the State of New Jersey hereby covenant and agree with each other and with the holders of any bonds or other obligations of the commission, for which tolls, rents, rates, or other revenues have been pledged, that, so long as any of said bonds or obligations remain outstanding and unpaid (unless adequate provision is otherwise made by law for the protection of those advancing moneys upon such bonds or obligations),

the Commonwealth of Pennsylvania and the State of New Jersey will not diminish or impair the power of the commission to own, operate and control said properties and facilities, or to establish, levy and collect tolls, rents, rates, and other charges in connection with such properties and facilities.

The Commonwealth of Pennsylvania and the State of New Jersey hereby covenant and agree with each other and with the holders of any bonds or obligations of the commission, for which tolls, rents, rates, or other revenues shall have been pledged, that the said Commonwealth and State will not authorize or permit the construction, operation and maintenance of any additional bridge or tunnel for the transportation of passengers by vehicles over the Delaware River by any other person or body, than the commission, within a distance of ten miles in either direction from any such toll bridge, measured along the boundary line between the said Commonwealth and the said State.

ARTICLE VII.

The bonds or obligations which may be issued by the commission for any of its authorized purposes, and as security for which tolls, rents, rates, and other revenues shall have been pledged, are hereby made securities in which all State and municipal officers and bodies of the Commonwealth of Pennsylvania and the State of New Jersey, and all banks, bankers, trust companies, savings banks, savings and loan associations, investment companies, and other persons carrying on a banking business, or insurance companies, insurance associations, and other persons carrying on an insurance business, and all administrators, executors, guardians, trustees; and other fiduciaries, and all other persons whatsoever, who now or may hereafter be authorized to invest in bonds or other obligations of the Commonwealth of Pennsylvania or of the State of New Jersey, may properly and legally invest funds, including capital belonging to them or within their control; and said bonds or other obligations are hereby made securities which may properly and legally be deposited with and received by any State or municipal officer, or agency of the Commonwealth of Penn-

sylvania and the State of New Jersey, for any purpose for which the deposit of bonds or other obligations, either of the Commonwealth or of the State, is now or may hereafter be authorized.

ARTICLE VIII.

The effectuation of its authorized purposes by the commission is and will be in all respects for the benefit of the people of the Commonwealth of Pennsylvania and the State of New Jersey, and for the increase of their commerce and prosperity, and since the commission will be performing essential governmental functions in effectuating said purposes, the commission shall not be required to pay any taxes or assessments upon any property acquired or used by it for purposes authorized by this agreement; and the bonds or obligations issued by the commission, their transfer and the income therefrom, including any profits made on the sale thereof, shall, at all times, be free from taxation within the Commonwealth of Pennsylvania and the State of New Jersey.

ARTICLE IX.

The commission shall make annual reports to the Governors and Legislatures of the Commonwealth of Pennsylvania and the State of New Jersey, setting forth in detail its operations and transactions, and may make such additional reports, from time to time, to the Governors and Legislatures as it may deem advisable.

Whenever the commission, after investigation and study, shall have concluded plans, with estimates of cost, and means of financing any new toll bridge across the Delaware River, as hereinbefore provided, it shall make to the Legislatures of each State, at the next sessions thereof, a detailed report, dealing with the contemplated project; but such project may, nevertheless, be proceeded with if the Legislatures of said States, or either of them, are not in session.

ARTICLE X.

Whenever particular bonds issued for any bridge or bridges, and the interest thereon, shall have been paid, or a sufficient amount shall have been provided for their pay-

ment and shall continue to be held for that purpose, the commission shall cease to charge tolls for the use of such bridge and thereafter such bridge shall be a free bridge, and shall thereafter be maintained equally at the cost of the Commonwealth of Pennsylvania and the State of New Jersey by appropriations made for such purposes, as now provided by law for the maintenance of bridges over the Delaware River acquired by the Commonwealth of Pennsylvania and the State of New Jersey.

In Witness Whereof, This Eighteenth day of December, A. D. 1934, A. Harry Moore, has affixed his signature hereto as Governor of the State of New Jersey and caused the great seal of the State to be attached thereto.

[SEAL.]

A. HARRY MOORE,
Governor, State of New Jersey.

And on this Nineteenth day of December, A. D. 1934, Gifford Pinchot, has affixed his signature hereto as Governor of the Commonwealth of Pennsylvania and caused the great seal of the Commonwealth to be attached thereto.

[SEAL.]

GIFFORD PINCHOT,
Governor, Commonwealth of Pennsylvania.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 563

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION, PENNSYLVANIA-NEW JERSEY,

Petitioner,

vs.

JOHN D. COLBURN AND BESSIE COLBURN.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI

POINT I.

The meaning and application of the compact between Pennsylvania and New Jersey for the acquisition, construction and maintenance of bridges across the Delaware River presents a Federal question reviewable here.

The Federal question involved was and is the determination of the effect of the compact.

The fundamental error of the New Jersey Court of Errors and Appeals was that it construed the compact between Pennsylvania and New Jersey, in respect to respondents' real property, none of which or street access thereto was taken by petitioner, as giving respondents a

right to consequential damages "by the closing of streets and by the obstruction of view and limitation of light and air by the construction of the abutments and approaches" (R. 278-279) by petitioner.

The New Jersey Court of Errors and Appeals further construed the compact as having included the New Jersey Act of 1912 as amended (P. L. 1912, C. 297, as amended by P. L. 1919, C. 76) in respect to an award for property "injured," although the reference in the compact to the 1912 Act was only to provide an alternate eminent domain method of acquiring property.

This, it is submitted, was error—(1) because the reference in the compact to the 1912 Act was for the very limited purpose of authorizing an alternate method in eminent domain procedure, and was not for the purpose of enlarging the scope of the Bridge Commission's authority to acquire real property as expressly defined in the compact itself, or for the purpose of imposing a duty upon the Bridge Commission to make awards for consequential damages; and, (2) because neither in the compact itself nor in the 1912 Act can there be found authority for a new right to an award for consequential damages for closing streets where street access is not taken and for the obstruction of view and the limitation of light and air in respect to lands not taken.

Manifestly, the determination of the effect of an interstate compact is a Federal question for ultimate adjudication by this Court.

U. S. Constitution, Art. I, Sec. X (2);

Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92 (Petition for Rehearing denied, 305 U. S. 668);

Kentucky v. Indiana, 281 U. S. 163;

Pennsylvania v. Wheeling & Belmont Bridge Company, 13 Howard 518;

Green v. Biddle, 8 Wheat. 1.

In *Hinderlader v. La Plata River and Cherry Creek Ditch Co.*, this Court said (p. 110) :

"For the decision below necessarily rests upon the premise that at the time the compact was made Colorado was absolutely entitled to at least 58 $\frac{1}{4}$ cubie feet of water per second, regardless of the amount left for New Mexico. The judgment cannot stand if this determination is erroneous. For whether the water of an interstate stream must be apportioned between the two states is a question of 'federal common law' upon which neither the statutes nor the decisions of either state can be conclusive."

The construction of the compact between Pennsylvania and New Jersey here under consideration is also, of necessity, a question of Federal law, upon which neither the statutes nor the decisions of either State can be conclusive.

In *Kentucky v. Indiana, supra*, this Court said (p. 176) :

"It cannot be gainsaid that in a controversy with respect to a contract between states, as to which the original jurisdiction of this court is invoked, this court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged."

In *Pennsylvania v. Wheeling & Belmont Bridge Company, supra*, this Court said (p. 566) :

"This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?"

and further said (p. 566) :

"In the case of *Green et al v. Biddle*, 8 Wheat. 1, this court held that a law of the State of Kentucky, which was in violation of this compact between Virginia and Kentucky, was void; and they say this court has authority to declare a state law unconstitutional,

upon the ground of its impairing the obligation of a compact between different states of the Union."

In the instant case it is the New Jersey Statute, as construed by the New Jersey Court of Errors and Appeals, which impairs the obligation of the compact.

Even though the solution of questions of construction of interstate compacts involve the determination of the effect of the local legislation of either State, this Court has the authority and duty to determine for itself all questions pertaining to the compact.

In *Kentucky v. Indiana, supra*, this Court said (p. 176):

"The fact that the solution of these questions may involve the determination of the effect of the local legislation of either state, as well as of acts of Congress, which are said to authorize the contract, in no way affects the duty of this court to act as the final, constitutional arbiter in deciding the questions properly presented."

Obviously, neither the Courts of Pennsylvania or New Jersey can finally determine questions arising from the construction and interpretation of the compact between the two States.

The two States are not necessary parties to this review. *Hinderlider v. La Plata River and Cherry Creek Ditch Co., supra*—on this point this Court said (p. 110):

"It has been suggested that this court lacks jurisdiction to determine the validity and effect of the compact because Colorado and New Mexico, the parties to it, are not parties to this suit and cannot be made so. The contention is unsound."

The judgment, a review of which is sought here, awarded a peremptory writ of mandamus, and is therefore a final judg-

ment reviewable by this Court, even though the matter of the amount of the award to be made is still open.

Detroit & M. R. Co. v. Michigan R. Commission, 240 U. S. 564;

Wheeling & B. B. Co. v. Wheeling Bridge Co., 138 U. S. 287.

POINT II.

Under the compact between Pennsylvania and New Jersey, landowners are not entitled to consequential damages.

It was conceded by the Colburns (respondents herein) in the mandamus suit that they had no right to damages, unless such right was conferred by the compact between the two States, and that the legal question involved in the suit was the construction of the compact.

The New Jersey Court held that the Colburns had no right to damages, unless the statutes authorizing the making of the compact created and gave such right (R. 279). The New Jersey Court also held that although the New Jersey Constitution does not provide for damages for injury from the construction of public works, the provision of the Pennsylvania Constitution in respect thereto should be read into the compact (R. 280), overlooking, however, the decisions of the Pennsylvania courts, which uniformly are that even though a provision of the Pennsylvania Constitution affords compensation to landowners for property injured by the construction of public works, this constitutional provision does not justify an award for consequential damages, unless there is a statute expressly providing therefor.

At the time of the making of the compact, the constitutional provisions of Pennsylvania and New Jersey applicable, and the rule of law as stated in the decisions of our courts, were as follows:

In New Jersey there was and is no constitutional provision for damages for "injury" to property, but only for "taking," which is:

"Private property shall not be taken for public use without just compensation; but land may be taken for public highways as heretofore until the Legislature shall direct compensation to be made." New Jersey Constitution, Art. I, Sec. 16.

Under the New Jersey decisions there was no right to light, air and view over other lands, and in eminent domain proceedings no right to an award for consequential damages for obstruction of view, limitation of light and air, or from the closing of streets.

Barnett v. Johnson, 15 N. J. Eq. 481;

Harwood ad. Tompkins, 24 N. J. L. 425;

Hayden v. Dutcher, 31 N. J. Eq. 217;

Newark v. Hatt, 79 N. J. L. 548;

R. & A. Realty Corporation v. Pennsylvania Railroad Company, 16 N. J. Misc. Reps. 537.

In Pennsylvania there is a constitutional provision for damage to property "injured" as well as for "taking," which is:

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways and improvements, which compensation shall be paid before such taking, injury or destruction" (Italics ours.) Pennsylvania Constitution, Art. 16, Sec. 8.

The courts of Pennsylvania have held that even under their Constitution there could be no recovery for consequential damages by adjoining landowners, unless in addi-

tion to the constitutional provision there was a statute expressly giving a right thereto.

In re Soldiers and Sailors Memorial Bridge, etc., in the City of Harrisburg, 308 Pa. 487;

Hoffer v. Reading Co., 287 Pa. 190;

Westmoreland C. & C. Co. v. Public Service Commission, 294 Pa. 451;

Pennsylvania Railroad Company v. Marchant, 119 Pa. 541, aff. 153 U. S. 380;

Pennsylvania Railroad v. Lippincott, 116 Pa. 472;

Holmes v. Public Service Commission, 79 Pa. Sup. Ct. 381,

and no recovery was ever allowed, unless the structure complained of had been erected in a public street.

The decisions in other jurisdictions were that even with constitutional provisions similar to those of Pennsylvania, and with statutory provisions similar to those of the compact, injuries of the kind here involved were *daminum absque iniuria*; instances being:

Howell v. New York, New Haven and Hartford Railroad Co., 221 Mass. 169;

Eachus v. Los Angeles, etc. Railroad Co., 103 Cal. 614.

There have been no decisions by either the Courts of Pennsylvania or of New Jersey construing the compact, except those of New Jersey in the record here sought to be reviewed.

The New Jersey courts, in their opinions (R. 18), cited *Chester County v. Brower*, 12 Atl. (Pa.) 577, and *Pennsylvania Railroad v. Miller*, 132 U. S. 75. In those cases the structure complained of had been erected in a public street upon which the lands of the complaining party abutted, but in the later Pennsylvania case of *Westmoreland C. & C. Co. v. Public Service Commission*, 294 Pa. 451, the court de-

elined to follow the decision in *Chester County v. Brower*. In *Pennsylvania Railroad Co. v. Miller, supra*, the structure complained of consisted of an elevated railroad on a public street in front of the plaintiff's premises, which interfered with his access; whereas in the instant case, the structure complained of is on lands privately acquired and owned by the Bridge Commission, which are to the rear of the Colburns' property, whose access thereto was not interfered with by the building of the bridge.

The 1912 Act in question related only to the acquisition of existing bridges and not to the construction of new bridges. As above pointed out, the 1912 Act is referred to in the compact only for the purpose of providing an alternate method of procedure in condemnation, and the language in the compact defining real property as including "claims for damage to real estate" clearly means claims for damage to real estate existing against third parties in favor of an owner of lands taken.

Under the compact, when the Commission acquires real property it may also acquire not only the land taken, but all interests pertaining thereto, including existing rights against third parties for damages for injuries to the lands so taken. This definition in nowise justifies an award for consequential damages for obstruction of view, limitation of light and air, and curtailment of access by the construction of the bridge and its approach upon lands owned by the Bridge Commission.

There is nothing in the title, preamble, recitals or body of the compact to indicate any intention to create new undefined and unlimited rights to consequential damages.

Under the determination of the New Jersey Court of Errors and Appeals, which petitioner seeks to have reviewed here, claims "damages may now be asserted by any number of persons in the neighborhood of the bridge,

who can and undoubtedly will claim that their properties have been injured in respect to light, air, view and access, by the building of the Phillipsburg-Easton Bridge, and instead of being required to pay damages according to well settled rules of law, petitioner may be required to pay damages not only to all adjoining landowners, but to all landowners in the vicinity of the bridge and its approach, whose view has been changed, and whose light, air and access have been affected, notwithstanding that the claims are remote and fanciful, and although from time immemorial the courts have held that damages of the kind complained of are *damnum absque injuria*. Furthermore, the future functioning of the Bridge Commission will be seriously curtailed and interfered with because of its inability to reasonably estimate in advance the entire cost of proposed new bridges.

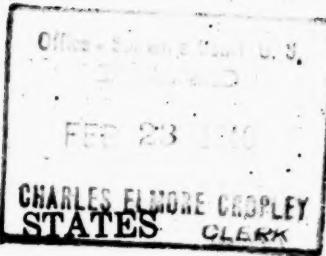
The compact can only be finally and authoritatively construed by this Court, and it is of great public importance that such construction be given at an early date.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Court should grant a writ of certiorari to review the final judgment of the New Jersey Court of Errors and Appeals.

EDWARD P. STOUT,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939.

No. 563

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION, PENNSYLVANIA-NEW JERSEY,

Petitioner,

vs.

JOHN D. COLBURN AND BESSIE COLBURN.

**On Writ of Certiorari to the Court of Errors and Appeals
of the State of New Jersey**

BRIEF FOR PETITIONER

✓ **JOHN H. PURSEL,**
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**921 Bergen Avenue,
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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1939.

No. 563

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION,
PENNSYLVANIA-NEW JERSEY,

Petitioner,

vs.

JOHN D. COLBURN AND BESSIE COLBURN.

On Writ of Certiorari to the Court of Errors and Appeals
of the State of New Jersey

BRIEF FOR PETITIONER.

The petition for the certiorari herein was filed November 30th, 1939, and an order of this Court allowing the certiorari was filed January 15th, 1940, in which the attention of counsel was directed to the jurisdictional question.

Statement of the Report of the Opinions
Delivered in the Courts Below.

The opinion below of the New Jersey Supreme Court in the instant case is reported under the title of *Klement et al. v. Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey*, 119 N. J. L. 600; 197 Atl. 896, and the opinion below of the New Jersey Court of Errors and Appeals is reported *John D. Colburn and Bessie Colburn v. Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey*, 123 N. J. L. 197; 8 Atl. 2d 563.

Statement of the Grounds on which the Jurisdiction of this Court is invoked.

The sole legal question involved in this case is the meaning and application of the 1934 Compact between Pennsylvania and New Jersey for the acquisition, construction and maintenance of bridges across the Delaware River. A copy of the Compact is hereto appended.

The meaning and application of such a compact presents a federal question for ultimate adjudication by this Court.

U. S. Constitution, Art. I, Sec. X (2);

Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92 (Petition for Rehearing denied, 305 U. S. 668);

Kentucky v. Indiana, 281 U. S. 163;

Pennsylvania v. Wheeling & Belmont Bridge Company, 13 Howard 518;

Green v. Biddle, 8 Wheat. 1.

The construction of the compact between Pennsylvania and New Jersey here under consideration is of necessity a question of federal law, upon which neither the statutes nor the decisions of either State can be conclusive.

Obviously, neither the courts of Pennsylvania nor New Jersey can finally determine questions arising from the construction and interpretation of the compact between the two States.

In *Hinderlider v. La Plata River and Cherry Creek Ditch Co., supra*, this Court said (p. 110):

"For the decision below necessarily rests upon the premise that at the time the compact was made Colorado was absolutely entitled to at least 58 $\frac{1}{4}$ cubic feet of water per second, regardless of the amount left for New Mexico. The judgment cannot stand if this de-

termination is erroneous. For whether the water of an interstate stream must be apportioned between the two states is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."

In *Kentucky v. Indiana*, *supra*, this Court said (p. 176) :

"It cannot be gainsaid that in a controversy with respect to a contract between states, as to which the original jurisdiction of this court is invoked, this court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged."

In *Pennsylvania v. Wheeling & Belmont Bridge Company*, *supra*, this Court said (p. 566) :

"This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?"

and further said (p. 566) :

"In the case of *Green et al. v. Biddle*, 8 Wheat. 1, this court held that a law of the State of Kentucky, which was in violation of this compact between Virginia and Kentucky, was void; and they say this court has authority to declare a state law unconstitutional, upon the ground of its impairing the obligation of a compact between different states of the Union."

In the instant case it is the New Jersey Statute, as construed by the New Jersey Court of Errors and Appeals, which impairs the obligation of the compact.

Even though the solution of questions of construction of interstate compacts involves the determination of the effect of the local legislation of either State, this Court has the authority and duty to determine for itself all questions pertaining to the compact.

In *Kentucky v. Indiana, supra*, this court further said (p. 176) :

"The fact that the solution of these questions may involve the determination of the effect of the local legislation of either state, as well as of acts of Congress, which are said to authorize the contract, in no way affects the duty of this court to act as the final, constitutional arbiter in deciding the questions properly presented."

The two States are not necessarily parties to this review. On this point, this Court in *Hinderliter v. La Plata River and Cherry Creek Ditch Co., supra*, said (p. 110) :

"It has been suggested that this court lacks jurisdiction to determine the validity and effect of the Compact because Colorado and New Mexico, the parties to it, are not parties to this suit and cannot be made so. The contention is unsound."

The meaning and application of a compact of the kind here under consideration between two states, presents a question of "federal common law" upon which neither the statutes nor the decisions of either state can be conclusive.

This Court in *Hinderliter v. La Plata River and Cherry Creek Ditch Co., supra*, held that the assent to the compact there in question by Congress did not make the matter one of federal statutory law, but left it one of "federal common law."

The assent of Congress to the Compact here involved did not make the matter in controversy one of federal statutory law, but left it one of "federal common law."

The Compact, therefore, is not to be finally construed by the Courts of either New Jersey or Pennsylvania, even though the construction of local statutes authorizing the Compact is involved.

Manifestly, neither the legislative, executive nor judicial branches of the government of either State can make a final determination as to the meaning and application of a compact.

The Compact, therefore, is to be governed not by the statutes or judicial decisions of either State, or by decisions construing federal statutes, but by the "federal common law."

In *Smith v. Alabama*, 124 U. S. 465, this Court said (p. 477) :

"There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states, each for itself, applied as its local law and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 33 U. S., 8 Peters 591."

and further said (p. 478) :

"There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English Common Law and are to be read in the light of its history. The code of constitutional and statutory construction, which, therefore, is gradually formed by the judgments of this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moore v. U. S.*, 91 U. S. 270."

Petitioner as a body corporate and politic, created by the Compact between Pennsylvania and New Jersey, was in duty bound to secure, if possible, a final and conclusive determination by this Court as to the meaning and application of the Compact in respect to claims for damages by

landowners whose real property and street access thereto had not been taken, and whose only claim was for consequential damages by the obstruction of view and limitation of light and air, and the closing of streets incidental to the acquisition of land and the building of a bridge by petitioner, and, therefore, petitioner applied to this Court for a writ of certiorari to review the judgment of the New Jersey Court of Errors and Appeals, which impaired the obligation of the Compact. The only legal question involved in the suit was the construction of the Compact, which was and is a question of "federal common law."

It was conceded by the respondents in their mandamus suit that they had no right to damages unless such right were conferred by the Compact between the two States. The New Jersey Courts below held that the respondents had no right to damages, unless the statutes authorizing the making of the Compact created and gave such right (R. 16).

The New Jersey Statute (P. L. 1934, Ch. 215), upon which the respondents relied and rely, provided that (See, 1):

"The Governor is hereby authorized to enter into a compact or agreement on behalf of the State of New Jersey, with the Commonwealth of Pennsylvania in substantially the following form: ***"

A copy of the 1934 Statute is hereto appended.

The Statute was ineffective unless Pennsylvania agreed to the proposed compact. In fact, Pennsylvania had previously enacted a similar Statute (Act of June 25th, 1931, No. 332, P. L. 1352, as amended by Act of May 18th, 1933, No. 138, P. L. 1827).

The Compact was signed by the Governor of New Jersey on December 18th, 1934, and by the Governor of Pennsylvania on December 19th, 1934. Congress approved the Compact on August 30th, 1935 (Publ. No. 411, 74th Congress).

Respondents' rights, if any, rest wholly upon this Compact. The Compact is a contract, and the rule of law is that contracts to which the State is a party should be construed in favor of the State.

*Panama-Pacific International Exposition Co. v.
Panama-Pacific International Commission, 178
Cal. 746; 174 Pac. 890.*

Applying this rule to the instant case, the Compact should be construed in favor of the two States and against a person making a claim under the Compact against the Bridge Commission.

Respondents also relied and rely upon certain provisions of a New Jersey Statute of 1912, as amended in 1919 (P. L. 1912, Ch. 297; P. L. 1919, Ch. 76). A copy of each of these Statutes is hereto appended. The reference in the Compact to the 1912 Act, as amended, is only to provide a method of procedure. The 1912 Act was also ineffective unless Pennsylvania concurred in the proposed joint action. The 1912 Act provided only for the acquisition of existing toll bridges. The Compact entered into, pursuant to the 1934 Act, authorized, among other things, the construction of new bridges.

Respondents had no rights whatsoever under the 1912 Act, as amended, because their claim for alleged damages did not arise from the acquisition of an existing toll bridge, but only from the construction of a new bridge. The respondents' claim, therefore, rests wholly upon the Compact, and particularly upon their contention that the Compact should be construed as creating new and undefined rights to consequential damages for obstruction of view and limitation of light and air, and by the closing of streets incidental to the acquisition of land and the building of the bridge by petitioner.

The question presented, therefore, is a question of "federal common law" for final determination by this Court.

Statement of the Case.

The petitioner is a body corporate and politic created pursuant to a Compact between the State of New Jersey and the Commonwealth of Pennsylvania (R. 15). The petitioner is vested with the power of eminent domain and may acquire real property and interests in real property (R. 16). The term "real property" is defined in the Compact as follows (B. 31):

"The term 'real property,' as used in this compact, includes lands, structures, franchises, and interests in land, including lands under water and riparian rights, and any and all things and rights usually included within the said term, and includes not only fees simple and absolute but also any and all lesser interests, such as easements, rights of way, uses; leases, licenses, and all other incorporeal hereditaments, and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate."

The petitioner acquired lands in the Town of Phillipsburg, New Jersey, by purchase and not by condemnation, and constructed thereon the New Jersey section of a bridge across the Delaware River between Phillipsburg, New Jersey, and Easton, Pennsylvania. The petitioner did not acquire any of respondents' land nor any easement pertaining thereto. Respondents' land abutted on a main highway known as North Main Street in Phillipsburg, and adjoined in the rear thereof lands acquired by the petitioner (R. 192).

To aid petitioner in its project, the Town of Phillipsburg, by ordinance, closed certain streets, partially closed, and relocated other streets, but North Main Street was not closed in whole or in part, nor was it relocated (R. 192).

Respondents alleged that their land had been injured by the construction of the bridge and its approach, which consisted in part of a solid-fill embankment, beginning at grade and reaching a maximum height of thirty-five feet, and by the obstruction of view and limitation of light and air, and by the closing of streets. Respondents, in effect, conceded that their damages, if any, would be *damnum absque injuria* except for the Compact, and made claim for damages based upon the language of the Compact (R. 16).

Petitioner declined to pay damages to respondents, and further declined to institute condemnation proceedings. Respondents obtained from the New Jersey Supreme Court an alternative writ of mandamus (R. 14). Petitioner contested the suit, and the New Jersey Supreme Court entered a final judgment awarding a peremptory writ of mandamus (R. 29). Petitioner appealed to the New Jersey Court of Errors and Appeals and that Court affirmed the judgment awarding the peremptory writ of mandamus (R. 213). The peremptory writ of mandamus commands petitioner to pay respondents, by agreement if possible, an amount equal to the extent to which the value of respondents' property has been diminished by reason of the building of a bridge abutment to the rear of respondents' land, and upon failing to agree in that regard, to institute, prosecute and consummate proceedings for the determination of the amount to be awarded respondents as compensation for their damages, pursuant to the statutes (R. 30).

As above pointed out (p. 6), the New Jersey courts below held that respondents had no right to damages unless the statutes authorizing the making of the Compact created and gave such right, and the sole question here is the construction of the Compact.

Specification of Errors.

1. The Compact in question did not give respondents a right to consequential damages by the closing of streets, by the obstruction of view and limitation of light and air, and by the construction of the abutments and approaches.
2. The New Jersey Act of 1912 (P. L. 1912, Ch. 297), as amended by the Act of 1919 (P. L. 1919, Ch. 76), and referred to in the Compact, provided a specific eminent domain method of acquiring property and did not give respondents a right to consequential damages.

Argument.

Point I.

The compact did not give respondents a right to consequential damages.

The New Jersey Courts below held that respondents have no right to damages unless the Statutes authorizing the making of the Compact give such right (R. 210), and also held that although the New Jersey Constitution does not provide for damages for injury from the construction of public works, the provision of the Pennsylvania Constitution in respect thereto should be read into the Compact (R. 12).

At the time of the making of the Compact the applicable constitutional provisions of Pennsylvania and New Jersey, and the rule of law as stated in the decisions of the Courts, were as follows:

In New Jersey there was and is no constitutional provision for damages for "injury" to property, but there is a provision only for damages for "taking" (Art. I, Sec. 16):

"Private property shall not be taken for public use without just compensation; but land may be taken for public highways as heretofore until the Legislature shall direct compensation to be made."

Under the New Jersey decisions there was no right to light, air and view over other lands, nor in eminent domain proceedings was there any right to an award for consequential damages for obstruction of view, limitation of light and air, or from the closing of streets.

Barnett v. Johnson, 15 N. J. Eq. 481;

Harwood Adm. Tompkins, 24 N. J. L. 425;

Hayden v. Dutcher, 31 N. J. Eq. 217;

Newark v. Hatt, 79 N. J. L. 548;

R. & A. Realty Corporation v. Pennsylvania Railroad Company, 16 N. J. Misc. Reps. 537.

In *Barnett v. Johnson*, *supra*, the New Jersey Court of Errors and Appeals pointed out the distinction between the right of an adjoining landowner to light and air from the highway upon which his lands abut, because of the necessity therefor, and the absence of such right as against privately-owned adjoining lands.

In *Harwood Adm. Tompkins*, *supra*, the New Jersey Supreme Court held that:

"No action lies in this state for obstructing a view, unless founded upon express covenant."

In *Hayden v. Dutcher*, *supra*, the New Jersey Court of Chancery held that:

"An easement of light and air, supplied to the windows of one person from the premises of another, cannot be acquired in this state by a mere user for twenty years under a claim of right."

The Court, after a careful review of the authorities said (p. 221) :

"But, in the case of windows overlooking the land of another, the injury, if any, is merely ideal and imaginary. The light and air which they admit are not the subjects of grant, nor of property beyond the moment of actual occupancy. In such a case there is no adverse user, nor, indeed, any use whatever of another's property. No foundation is, therefore, laid for indulging in any presumption against the rightful owner."

and also said (p. 222) :

"A judgment pronounced by the court of queen's bench, in 1588, is reported in *Cro. Eliz., Bury v. Pope*, in which it is said that it was agreed by all the justices, that if two men be the owners of two parcels of land adjoining, and one of them doth build a house upon his land and makēs windows and lights looking into the other's land, and this house and lights have continued for the space of thirty or forty years, yet the other may, upon his own soil, lawfully erect a house against the other's lights and windows, and he can have no action, for it was his own folly to build his house so near to his neighbor's land; and it was adjudged accordingly. At this date, a user to raise a right by prescription, must have continued 'during time whereof the memory of man runneth not to the contrary,' or from the beginning of the reign of Richard I."

In *Newark v. Hatt, supra*, the New Jersey Court of Errors and Appeals said (p. 550) :

"The right of the state to destroy public improvements of this class without compensation is not limited by the constitution, and except for the statute, as expressed in the charter of the city, this street could have been vacated without the slightest consideration

of its effect upon any land lying along it, or the payment by the city of compensation to any landowners for damages."

In *R. & A. Realty Corporation v. Pennsylvania Railroad Company, supra*, the Court, after reviewing the authorities, said (p. 542) :

"It is settled that the owner of land abutting on a highway has no vested right to recover damages for a change of grade of the highway in the absence of a statute giving that right, and this is so even though the general effect of the change of grade is to impair or substantially destroy access to the landowner's property. It is not a taking of property in the legal sense. It is *damnum absque injuria*." (Citing authorities.)

The Pennsylvania Constitution provides for damages to property "injured" as well as damages for "taking," (Art. 16, Sec. 8) :

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for *property taken, injured or destroyed by the construction or enlargement of their works*, highways and improvements, which compensation shall be paid before such taking, injury or destruction * * *." (Italics ours).

The courts of Pennsylvania have held that even under their constitution there could be no recovery by adjoining landowners for consequential damages unless, in addition to the constitutional provision, there was a statute expressly giving a right thereto.

In re Soldiers and Sailors Memorial Bridge, etc., in the City of Harrisburg, 308 Pa. 487;

Hoffer v. Reading Co., 287 Pa. 120;

Westmoreland C. & C. Co. v. Public Service Commission, 294 Pa. 451;

Pennsylvania Railroad Company v. Marchant, 119 Pa. 541, aff'd 153 U. S. 380;

Pennsylvania Railroad v. Lippincott, 116 Pa. 472; *Holmes v. Public Service Commission*, 79 Pa. Sup. Ct. 381,

and no recovery was ever allowed, unless the structure complained of had been erected in a public street.

In the case of *In re Soldiers and Sailors Memorial Bridge, etc., in the City of Harrisburg, supra*, the Supreme Court of Pennsylvania said (p. 491):

"An abutting owner could not recover consequential damages for a change of grade before the Constitution of 1874. *Struthers v. Dunkirk, etc. Ry. Co.*, 87 Pa. 282. The present Constitution makes this possible. *County of Chester v. Brower*, 117 Pa. 647, 12 A. 577, 2 Am. St. Rep. 713; *Appeal of Delaware County*, 119 Pa. 159, 13 A. 62. But before the right may be exercised, the state must authorize it by some statute. *Westmoreland C. & U. Co. v. Public Service Commission*, 294 Pa. 451, 458, 144 A. 407, and authorities there cited. The owner is without remedy unless the Legislature provides one."

and also said (p. 492):

"The title of the act shows no attempt to impose liability for such damage on the state; as the judge of the court below said, such damages were entirely omitted from the title. We have repeatedly held that where an act imposes on counties new burdens, without an intention so to do being clearly indicated in the title of the act in question, the act as it relates to those particular burdens is unconstitutional." (Citing cases.)

In *Heffer v. Reading Co.*, *supra*, the Pennsylvania Supreme Court held that:

"Constitution 1874, Article 16, Section 8, requiring compensation for injuring or destroying property has

no application to occupation of land for public highways or consequential injuries theréfrom," and that "change of grade of public road is no basis for recovery of damages by abutting owners against municipality, in absence of statutory liability."

In *Westmoreland C. & C. Co. v. Public Service Commission, supra*, the Supreme Court of Pennsylvania said (p. 457) :

"The state, to properly exert its regulatory control over public utilities, gave the Public Service Commission a modified but exclusive control over certain dangerous conditions in our highway systems. It may order abolished dangerous crossings over railroads. In all these changes, this court has endeavored to adhere to the fundamental rules laid down early in our history, as a part of governmental policy. As part of that policy, before the Constitution of 1874, an abutting owner could not recover damages for the change of grade. *Struthers v. Dunkirk, etc., Ry. Co.*, 87 Pa. 282, and cases cited. The reasons are well stated in those opinions. In a case similar to the facts now before us, we held our present Constitution gave the right to consequential damages. *Chester County v. Brower*, 117 Pa. 647, 12 A. 577, 2 Am. St. Rep. 713; *Delaware County's Appeal*, 119 Pa. 159, 13 A. 62, even though no statute imposed the liability. In such case, recovery could be had in an action at law classified under old forms of pleading as an action on the case. *Pennsylvania Railroad Co. v. Duncan*, 111 Pa. 352, 5 A. 742; *Chester County v. Brower*, *supra*, page 656 (12 A. 578). We there stated that a county was a municipality within article 16, liable for consequential damages to property injured by change of grade, though the state had not provided a remedy. These cases were in opposition to repeated expressions of the court as to the effect of similar constitutional provisions. Since then, these decisions have been modified, if not set aside. We have returned to our former policy of

placing the right to damages within the grant of the sovereign, and the rule is now well settled that damages for consequential injuries cannot be recovered by a property owner under the present Constitution, unless the Legislature gave that right and imposed such liability on the municipality."

In *Pennsylvania Railroad Company v. Merchant*, *supra*, the Pennsylvania Supreme Court followed its decision in *Pennsylvania Railroad v. Lippincott*, *supra*, and said (p. 557):

"Just here it is proper to say there is not a word about 'consequential' injuries in the Constitution. The word itself has acquired a broad popular meaning by which many persons may be misled. In judicial proceedings it should be used intelligently, and with due regard to its proper meaning."

and also said (p. 561):

"We understand the word 'injuries' or 'injured', as used in the Constitution, to mean such a legal wrong as would be the subject to an action for damages at common law."

and further said (p. 562):

"that they intended to give a remedy merely for legal wrongs, and not for such injuries as were *damnum absque injuria*. Among the latter class of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner, without negligence and without malice. Such injuries have never been actionable since the foundation of the world."

In *Holmes v. Public Service Commission*, *supra*, the Court followed the decisions in *Pennsylvania Railroad v. Lippincott*, *supra*, and *Pennsylvania Railroad Company v. Merchant*, *supra*, and other later cases, and said (p. 390):

"Where the railroad company erects its construction on its own land, even though it may interfere with the light and air of an abutting property owner and cause him inconvenience, it is in the absence of negligence *damnum absque injuria.*"

In jurisdictions other than New Jersey and Pennsylvania, even with constitutional provisions similar to those of Pennsylvania and with statutory provisions similar to the language of the Compact in question, injuries of the kind here involved were held to be *damnum absque injuria*. The following are instances of such decisions:

In *Howell v. New York, New Haven and Hartford Railroad Company*, 221 Mass. 169, the Massachusetts Supreme Court, in construing a statute which provided for the payment of damages caused by laying out, making and maintaining a railroad, held:

"The partial cutting off of the view from a dwelling house by the raising to the level of the knob on the front door of the grade of a railroad track in its vicinity, but not on the owner's property, for the purpose of abolishing a grade crossing, is not within the operation of a statute providing for the payment of damages caused by laying out, making, and maintaining a railroad, and the liability is not enlarged by a provision that all damages which may be caused by a railroad located in connection with the abolition of a grade crossing shall be paid by the railroad company."

The Court made a distinction between damage in fact and damage in law, where no part of the land is taken, and held that remote and fanciful consequential damages to adjoining property were not recoverable, and said (p. 175):

"The interference with the view from the petitioner's house and estate, which is the sole ground on which damages are sought in the case at bar, seems to us to relate to matters too remote and speculative and are

not sufficiently distinct, separate, special and peculiar to the petitioners to warrant a recovery even under the broad rule established by the statute. They are not different in kind from those suffered by all the public who travel on Mill Street, but only greater in degree. The scar upon a landscape resulting from a high railroad embankment and the consequent intrusion of the business of railroading upon the solitude of hill and mountain may have an appreciably deleterious effect upon a distant estate, whose chief market value may lie in its remoteness and seclusion from evidences of commercialism. It is conceivable that evidence might be proffered tending to show that the intrusion was obnoxious and the effect upon market value was substantial. No decision here or elsewhere, so far as we are aware, ever has gone so far as to hold that damages might be recovered for invasion of purely esthetic elements of value such as these."

In *Eachus v. Los Angeles, d.c., Railroad Co.*, 103 Cal. 614, the Court, in considering the provision of the California Constitution that "private property shall not be taken or damaged for public use without just compensation," said (p. 617):

"Damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the Constitution; but the property itself must suffer some diminution in substance or be rendered intrinsically less valuable by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable and even less salable; but this is not an injury to the property itself so much as an influence affecting its use for certain purposes."

The respondents did not allege that any easement, express or implied, appertained to their land as against the lands acquired by petitioner, and it is, therefore, unnecessary to consider the state of the law in respect to actual easements for air, light and view, except, in passing, it is to be noted that even express easements for light, air and view do not extend beyond the necessity therefor. Under the facts of this case, even if respondents had an actual easement, there would have been no legal interference therewith, because there was still ample light and air for the enjoyment of the respondents' property and no loss of view of or from their property. There was only a change of view, and, as to light and air, there was just as much, if not more, after the building of the bridge and its approach, as there had been prior thereto. The respondents had no easement and their claim is wholly based upon an alleged newly-created right, undefined and practically unlimited. Such a right, if allowed, would be a great innovation and novelty in the law, and would create a most dangerous precedent for damage claims of all kinds and descriptions, and would be a complete abandonment of the sane and fundamental rule that there may be damages without legal injury; that is to say, the principle of *damnum absque injuria*.

So far as the closing, partial closing, and relocation of streets were concerned, the action was by the Town of Phillipsburg, and not by the Bridge Commission. Respondents' claim for damages, if any, resulting therefrom, must be asserted against the Town of Phillipsburg. The main highway upon which respondents' land abutted was not closed wholly or partially, nor was it relocated; and, in the legal sense, there was no curtailment of access to or from respondents' land.

As above pointed out, the "federal common law," under which the Compact is to be construed, adopts the general common law, *Smith v. Alabama*, 124 U. S. 465, and, there-

fore, in construing the Compact between Pennsylvania and New Jersey, both of which are common law states, the sound and safe principles of the general common law should be applied.

The respondents' claim is asserted upon the contention that the Compact created new rights not known to the common law, and, therefore, being in derogation of the common law, the Compact should be strictly construed against the enlargement of the common law principle, because unless the intent is plain and the language clear and unambiguous, such a construction should not be given.

Shaw v. Railroad Co., 101 U. S. 557.

A careful reading of the title, preamble, recitals and body of the Compact fails to bring to light any intention to create new, undefined and unlimited, rights to consequential damages. The definition in the Compact of the term "real property" as including "claims for damage to real estate" is greatly stressed by respondents, but this clearly relates only to that which the Bridge Commission may acquire by purchase or condemnation, and not to claims against the Commission. The Bridge Commission may acquire lands, structures, franchises, an interest in lands, including lands under water and riparian rights, and any and all things and rights usually included within the said term, and includes not only fees simple and absolute, but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses and all other incorporeal hereditaments, and every estate, interest and right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages or otherwise, and also claims for damage to real estate.

The words "damage to real estate" clearly mean that when the Bridge Commission acquires real property by

purchase or condemnation, it may also acquire claims for damage to real estate existing in favor of the property owners and against third parties. There is nothing in this language that justifies the contention that the Bridge Commission is required to pay damages to property owners whose lands are not taken, and has no reference to claims for damages by property owners against the Bridge Commission.

The respondents also stress certain language in the New Jersey Act of 1912, as amended in 1919 (P. L. 1912, Ch. 297; P. L. 1919, Ch. 76), as follows (Sec. 3):

"The said joint commission having viewed the premises or examined the property shall hear all parties interested and their witnesses, and shall estimate the value of the property taken, including any easement, rights or franchises incident thereto, as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable."

As will be hereafter set forth under the succeeding point, the reference in the Compact to the 1912 Act, as amended by the 1919 Act, is for the purpose of providing a specific method of eminent domain procedure, but, under the present point, it should suffice to say that even though the 1912 Act, as amended by the 1919 Act, were wholly incorporated into the Compact, there would still be no legal foundation therein for respondents' claim, because the 1912 Act, as amended by the 1919 Act, only provided for the acquisition of existing toll bridges and the turning of the same into free bridges, and did not contemplate nor provide for the construction of new bridges. It is apparent that the words "damages for property injured" were intended to apply to actual legal rights that were destroyed by the condemnation of an existing toll bridge and the turning of the same into a free bridge. There was nothing in the 1912 Act, as amended, to indicate

a legislative intent to create new, undefined and unlimited rights to damages beyond recognized existing common law rights to damages for property injured.

Applying all of the foregoing to the question of the construction of the Compact, it is submitted that the true legal meaning and application thereof precludes respondents' claim, and that there should be a reversal of the judgment of the New Jersey Court of Errors and Appeals, which construed the Compact as giving respondents a right to consequential damages.

Point II.

Reference in the Compact to the New Jersey Act of 1912, as amended, provided only a specific eminent domain method, and gave no right to consequential damages.

In 1912 the New Jersey Legislature passed an Act (P. L. 1912, Ch. 297), which provided for the appointment of a Commission of three members, and made an initial appropriation to purchase toll bridges across the Delaware River. It was subject to Pennsylvania's concurrence, which did not take place until 1917 (Act No. 406, P. L. 1184). Joint action under these statutes related solely to the acquisition of existing toll bridges and the conversion thereof into free bridges. The New Jersey 1919 amendment (P. L. 1919, Ch. 76) authorized the members of the Bridge Commission to sit as condemnation commissioners.

The Compact in question resulted from a Pennsylvania Statute of 1931 (Act No. 332, P. L. 1352), as amended by an Act of 1933 (Act No. 138, P. L. 1827), and the 1934 New Jersey Statute (P. L. 1934, Ch. 215). The Compact was signed by the respective Governors in December, 1934, and was assented to by Congress in 1935, such assent being

a requisite to its validity under Article I, Section X (2) of the Federal Constitution.

The Compact authorized the building of new toll bridges, later to become free bridges. The Compact, by Article II, Sub-division (o), gave the Bridge Commission the same powers which the former joint commission had with respect to the acquisition of existing toll bridges. The Bridge Commission was given the power of eminent domain by Article II, Sub-division (m).

Article III of the Compact provided:

"If the Commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property in the State of New Jersey for any reason whatsoever, then the Commission may acquire such property by the exercise of the right of eminent domain in the *manner* provided by the Act of the State of New Jersey entitled 'An Act authorizing the acquisition and maintaining by the State of New Jersey in conjunction with the State of Pennsylvania of toll bridges across the Delaware River, and providing for free travel across the same' approved the first day of April, 1912 (Chapter 297) and the various acts amendatory thereof and supplementary thereto relating to the acquisition of interstate toll bridges over the Delaware River."

The New Jersey 1912 Act, as amended by the 1919 Act, therefore, is referred to in the Compact only for the purpose of providing specific eminent domain procedure. There is nothing in the Compact to indicate or even suggest that the New Jersey 1912 Act, as amended, was incorporated in the Compact by reference, for any purpose other than to provide a *method or manner* of procedure, and certainly there was no intent to enlarge the effect of the 1912 Act, as amended, so as to provide for consequential damages to adjoining property owners, for injuries from

the construction of new bridges. In its widest application, the New Jersey 1912 Act related only to the acquisition of existing bridges, and whether the Act be incorporated entirely into the Compact, or merely to provide a method of procedure, the result is the same, and no legal foundation for respondents' claim can be found in either the 1934 Compact or the 1912 Act, as amended.

It is submitted that the Court below was in error in giving an unauthorized meaning and application to the New Jersey 1912 Act, as amended, as incorporated by reference in the Compact and, therefore, there should be a reversal of the judgment of the New Jersey Court of Errors and Appeals.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the New Jersey Court of Errors and Appeals should be reversed, with a direction to dismiss the mandamus suit.

JOHN H. PURSEL,
Attorney for Petitioner.

EDWARD P. STOUT,
Counsel for Petitioner.

APPENDIX.

AGREEMENT BETWEEN THE COMMON- WEALTH OF PENNSYLVANIA AND THE STATE OF NEW JERSEY

Creating the Delaware River Joint Toll Bridge Com- mission as a body corporate and politic and defining its powers and duties

Whereas, The commission, on behalf of the Commonwealth of Pennsylvania, existing by virtue of the act, approved the eighth day of May, one thousand nine hundred and nineteen (Pamphlet Laws, one hundred forty-eight), and its supplements and amendments, and the commission, on behalf of the State of New Jersey, existing by virtue of the provisions of the act, approved the first day of April, one thousand nine hundred and twelve (Chapter, two hundred ninety-seven), and its supplements and amendments, acting as a joint commission, have acquired various toll bridges over the Delaware River between the Commonwealth of Pennsylvania and the State of New Jersey; and

Whereas, Additional bridge facilities between the two States will be required in the future for the accommodation of the public and the development of both States; and

Whereas, Such additional bridge facilities should be developed without the expenditure of large sums from the public revenues; and

Whereas, It is highly desirable that there be a single agency for both States empowered to further the transportation interests of these States with respect to that part of the Delaware River north of the stone arch bridge of the Pennsylvania Railroad from Morrisville to Trenton; now therefore,

The Commonwealth of Pennsylvania and the State of New Jersey do hereby solemnly covenant and agree, each with the other, as follows:

ARTICLE I.

There is hereby created a body corporate and politic to be known as the Delaware River Joint Toll Bridge Commission (hereinafter in this agreement called the "Commission"), which shall consist of the commissioners, on behalf of the Commonwealth of Pennsylvania, provided for by the act, approved the eighth day of May, one thousand nine hundred and nineteen (Pamphlet Laws, one hundred forty-eight), and its supplements and amendments, for the acquisition of toll bridges over the Delaware River, and of commissioners, on behalf of the State of New Jersey, provided for by the act, approved the first day of April, one thousand nine hundred and twelve (Chapter, two hundred ninety-seven), and its supplements and amendments, for the acquisition of toll bridges over the Delaware River, which said commissions have heretofore been acting as a joint commission by virtue of reciprocal legislation.

No action of the commission shall be binding unless a majority of the members of the commission from Pennsylvania and a majority of the members of the commission from New Jersey shall vote in favor thereof.

The commission shall constitute the public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey for the following public purposes, and shall be deemed to be exercising an essential governmental function in effectuating such purpose, to wit:

(a) The administration, operation, and maintenance of the joint State-owned bridges across the Delaware River between the Commonwealth of Pennsylvania and the State of New Jersey, and located north of the present stone arch bridge of the Pennsylvania Railroad across the Delaware River from Morrisville to Trenton;

- (b) The investigation of the necessity for additional bridge communications over the Delaware River north of the said railroad bridge, and the making of such studies, surveys, and estimates as may be necessary to determine the feasibility and cost of such additional bridge communications;
- (c) The preparation of plans and specifications for, and location, construction, administration, operation and maintenance of, such additional bridge communications over the Delaware River, north of the aforesaid railroad bridge, as the commission deems necessary to advance the interests of the two States and to facilitate public travel; and the issuance of bonds and obligations to provide moneys sufficient for the construction of such bridges; and the collection of tolls, rentals, and charges for the redemption of such bonds and obligations, and the payment of interest thereon;
- (d) The procurement from the Government of the United States of any consents which may be requisite to enable any project within its powers to be carried out.

ARTICLE II.

For the effectuation of its authorized purposes, the commission is hereby granted the following powers:

- (a) To have perpetual succession.
- (b) To sue and be sued.
- (c) To adopt and use an official seal.
- (d) To elect a chairman, vice-chairman, secretary and treasurer, and appoint an engineer. The secretary, treasurer, and engineer need not be members of the commission.
- (e) To adopt suitable by-laws for the management of its affairs.

- (f) To appoint such other officers, agents and employes as it may require for the performance of its duties.
- (g) To determine the qualifications and duties of its appointees, and to fix their compensation.
- (h) To enter into contracts.
- (i) To acquire, own, hire, use, operate, and dispose of personal property.
- (j) To acquire, own, use, lease, operate, and dispose of real property and interest in real property, and to make improvements thereon.
- (k) To grant the use of, by franchise, lease, and otherwise, and to make and collect charges for the use of, any property or facility owned or controlled by it.
- (l) To Borrow money upon its bonds or other obligations, either with or without security.
- (m) To exercise the power of eminent domain.
- (n) To determine the exact location, system, and character of, and all other matters in connection with, any and all improvements or facilities which it may be authorized to own, construct, establish, effectuate, maintain, operate or control.
- (o) In addition to the foregoing powers, to exercise the powers, duties, authority and jurisdiction heretofore conferred and imposed upon the aforesaid commissions, hereby constituted a joint commission by reciprocal legislation of the Commonwealth of Pennsylvania and the State of New Jersey, with respect to the acquisition of toll bridges over the Delaware River, the management, operation and maintenance of such bridges, and the location, construction, operation and maintenance of additional bridge communications over the Delaware River north of the aforesaid railroad bridge of the Pennsylvania Railroad.

(p) To exercise all other powers, not inconsistent with the Constitutions of the State of Pennsylvania and New Jersey or of the United States, which may be reasonably necessary or incidental to the effectuation of its authorized purposes or to the exercise of any of the foregoing powers, except the power to levy taxes or assessments for benefits; and generally to exercise, in connection with its property and affairs and in connection with property under its control, any and all powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.

ARTICLE III.

If for any of its authorized purposes (including temporary purposes), the commission shall find it necessary or convenient to acquire for public use any real property in the Commonwealth of Pennsylvania or the State of New Jersey, whether for immediate or future use, the commission may, by resolution, determine to acquire such property by a fee simple absolute or a lesser interest, and the said determination shall not be affected by the fact that such property has theretofore been taken for or is, then devoted to a public use, but the public use in the hands or under the control of the commission shall be deemed superior to the public use in the hands or under the control of any other person, association, or corporation.

If the commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property, in the Commonwealth of Pennsylvania, for any reason whatsoever, then the commission may acquire such real property by the exercise of the right of eminent domain, in the manner provided by the act, approved the eighth day of May, one thousand nine hundred and nineteen (Pamphlet Laws, one hundred forty-eight), entitled

"An act providing for the joint acquisition and maintenance by the Commonwealth of Pennsylvania and the State of New Jersey of certain toll bridges over the Delaware River," and the acts amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River.

If the commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property, in the State of New Jersey, for any reason whatsoever, then the commission may acquire such property by the exercise of the right of eminent domain, in the manner provided by the act of the State of New Jersey, entitled "An act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware River; and providing for free travel across the same," approved the first day of April, one thousand nine hundred and twelve (Chapter, two hundred ninety-seven), and the various acts amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River.

The power of the commission to acquire real property by condemnation or the exercise of the power of eminent domain in the Commonwealth of Pennsylvania and the State of New Jersey shall be a continuing power and no exercise thereof shall be deemed to exhaust it.

The commission and its duly authorized agents and employes may enter upon any land, in the Commonwealth or the State of New Jersey, for the purpose of making such surveys, maps, or other examinations thereof, as it may deem necessary or convenient for its authorized purposes.

However, anything to the contrary contained in this compact notwithstanding, no property, now or hereafter vested in or held by any county, city, borough, village, township or other municipality, shall be taken by the commission with-

out the consent of such municipality, unless expressly authorized so to do by the Commonwealth or State in which such municipality is located. All counties, cities, boroughs, villages, townships and other municipalities, and all public agencies and commissions of the Commonwealth of Pennsylvania and the State of New Jersey, notwithstanding any contrary provision of law, are hereby authorized and empowered to grant and convey to the commission upon its request, but not otherwise, upon reasonable terms and conditions, any real property which may be necessary or convenient to the effectuation of its authorized purposes, including real property already devoted to public use.

The Commonwealth of Pennsylvania and the State of New Jersey hereby consent to the use and occupation by the commission of any real property of the said two States, or of either of them, which may be or become necessary or convenient to the effectuation of the authorized purposes of the commission, including lands lying under water and lands already devoted to public use.

The term "real property," as used in this compact, includes lands, structures, franchises, and interests in land, including lands under water and riparian rights, and any and all things and rights usually included within the said term, and includes not only fees simple and absolute but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses, and all other incorporeal hereditaments, and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate.

ARTICLE IV.

Notwithstanding any provision of this agreement, the commission shall have no power to pledge the credit of the Commonwealth of Pennsylvania, or of the State of New

Jersey, or of any county, city, borough, village, township and other municipality of said Commonwealth or State, or to create any debt against said Commonwealth or State or any such municipality.

ARTICLE V.

The commission is hereby authorized to make and enforce such rules and regulations, and to establish, levy and collect (or to authorize, by contract, franchise, liens or otherwise, the establishment, levying and collection of) such tolls, rates, rents, and other charges, in connection with any such bridge across the Delaware River which it may hereafter construct and operate, as it may deem necessary, proper, desirable and reasonable, which tolls, rates, rents, and other charges shall be at least sufficient to meet interest and sinking fund charges on bonds and obligations issued by the commission, the maintenance of such bridge, and the administrative expenses of the commission properly chargeable to such bridge. The commission is hereby authorized and empowered to pledge such tolls, rates, rents, and other revenues, or any part thereof, as security for the repayment, with interest, of any moneys borrowed by it or advanced to it for any of its authorized purposes, and as security for the satisfaction of any other obligation assumed by it in connection with such loans or advances.

ARTICLE VI.

The Commonwealth of Pennsylvania and the State of New Jersey hereby covenant and agree with each other and with the holders of any bonds or other obligations of the commission, for which tolls, rents, rates, or other revenues have been pledged, that, so long as any of said bonds or obligations remain outstanding and unpaid (unless adequate provision is otherwise made by law for the protection of those advancing moneys upon such bonds or obligations),

the Commonwealth of Pennsylvania and the State of New Jersey will not diminish or impair the power of the commission to own, operate and control said properties and facilities, or to establish, levy and collect tolls, rents, rates, and other charges in connection with such properties and facilities.

The Commonwealth of Pennsylvania and the State of New Jersey hereby covenant and agree with each other and with the holders of any bonds or obligations of the commission, for which tolls, rents, rates, or other revenues shall have been pledged, that the said Commonwealth and State will not authorize or permit the construction, operation and maintenance of any additional bridge or tunnel for the transportation of passengers by vehicles over the Delaware River by any other person or body, than the commission, within a distance of ten miles in either direction from any such toll bridge, measured along the boundary line between the said Commonwealth and the said State.

ARTICLE VII.

The bonds or obligations which may be issued by the commission for any of its authorized purposes, and as security for which tolls, rents, rates, and other revenues shall have been pledged, are hereby made securities in which all State and municipal officers and bodies of the Commonwealth of Pennsylvania and the State of New Jersey, and all banks, bankers, trust companies, savings banks, savings and loan associations, investment companies, and other persons carrying on a banking business, or insurance companies, insurance associations, and other persons carrying on an insurance business, and all administrators, executors, guardians, trustees, and other fiduciaries, and all other persons whatsoever, who now or may hereafter be authorized to invest in bonds or other obligations of the Commonwealth of Pennsylvania or of the State of New Jersey, may prop-

erly and legally invest funds, including capital belonging to them or within their control; and said bonds or other obligations are hereby made securities which may properly and legally be deposited with and received by any State or municipal officer, or agency of the Commonwealth of Pennsylvania and the State of New Jersey, for any purpose for which the deposit of bonds or other obligations, either of the Commonwealth or of the State, is now or may hereafter be authorized.

ARTICLE VIII.

The effectuation of its authorized purposes by the commission is and will be in all respects for the benefit of the people of the Commonwealth of Pennsylvania and the State of New Jersey, and for the increase of their commerce and prosperity, and since the commission will be performing essential governmental functions in effectuating said purposes, the commission shall not be required to pay any taxes or assessments upon any property acquired or used by it for purposes authorized by this agreement; and the bonds or obligations issued by the commission, their transfer and the income therefrom, including any profits made on the sale thereof, shall, at all times, be free from taxation within the Commonwealth of Pennsylvania and the State of New Jersey.

ARTICLE IX.

The commission shall make annual reports to the Governors and Legislatures of the Commonwealth of Pennsylvania and the State of New Jersey, setting forth in detail its operations and transactions, and may make such additional reports, from time to time, to the Governors and Legislatures as it may deem advisable.

Whenever the commission, after investigation and study, shall have concluded plans, with estimates of cost, and

means of financing any new toll bridge across the Delaware River, as hereinbefore provided, it shall make to the Legislatures of each State, at the next sessions thereof, a detailed report, dealing with the contemplated project; but such project may, nevertheless, be proceeded with if the Legislatures of said States, or either of them, are not in session.

ARTICLE X.

Whenever particular bonds issued for any bridge or bridges, and the interest thereon, shall have been paid, or a sufficient amount shall have been provided for their payment and shall continue to be held for that purpose, the commission shall cease to charge tolls for the use of such bridge and thereafter such bridge shall be a free bridge, and shall thereafter be maintained equally at the cost of the Commonwealth of Pennsylvania and the State of New Jersey by appropriations made for such purposes, as now provided by law for the maintenance of bridges over the Delaware River acquired by the Commonwealth of Pennsylvania and the State of New Jersey.

In Witness Whereof, This Eighteenth day of December, A. D. 1934, A. Harry Moore, has affixed his signature hereto as Governor of the State of New Jersey and caused the great seal of the State to be attached thereto.

A. HARRY MOORE,

[SEAL]

Governor, State of New Jersey.

And, on this Nineteenth day of December, A. D. 1934, Gifford Pinchot, has affixed his signature hereto as Governor of the Commonwealth of Pennsylvania and caused the great seal of the Commonwealth to be attached thereto.

GIFFORD PINCHOT,

[SEAL]

Governor, Commonwealth of Pennsylvania.

NEW JERSEY STATUTE OF 1912

CHAPTER 297

AN ACT authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware river, and providing for free travel across the same.

WHEREAS, Toll bridges have been constructed and are now maintained at various places across the Delaware river between the State of New Jersey on one side and the State of Pennsylvania on the other by companies incorporated under and by virtue of the laws of the States of New Jersey and Pennsylvania, which toll bridges are necessary for the accommodation of the public, the carrying on of business and for social intercourse; and

WHEREAS, By reason of the constant increase in the population in the border counties of said States and the constant increase in traffic upon and across said bridges, the payment of toll has become a serious burden and tax upon the people of both said States, and operates to their detriment; therefore

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Three persons shall be appointed by the Governor to be constituted a commission together with a like board or commission from the State of Pennsylvania to acquire the rights, franchises and property of the several bridge companies owning and operating toll bridges across said Delaware river between the State of New Jersey and the State of Pennsylvania, except such as are owned by steam or electric railways or railroads and used for railway or rail-

road purposes, such acquisition to be either by purchase or to be had and effected by the State of New Jersey under and by virtue of its rights of eminent domain as set forth in sections two and three of this act. The State of New Jersey to pay one-half of the cost of said properties and one-half the cost of acquiring the same, the other half to be paid by the State of Pennsylvania.

2. In case the compensation accruing from such appropriation has not been agreed upon the Court of Common Pleas of the county in which the bridges, or any of them so taken shall be situated, or any law judge thereof in vacation, without any bond being required to be filed, on application thereto, by the Attorney-General of the State, or any corporation, stock company, partnership or persons interested, shall appoint three discreet and disinterested freeholders as viewers, and appoint a time not less than twenty nor more than thirty days therefrom, when said viewers shall meet upon the property and view the same, and the premises affected thereby; the said viewers shall give at least ten days' personal notice of the time and place of the first meeting to the Attorney-General, and to the president, secretary or director of any corporation stock company or partnership affected, if any of the aforesaid officers reside in the county in which said bridges are located, otherwise by advertisement for three consecutive weeks in two newspapers published in said county, and by hand-bills posted upon the premises or by such notice as the court shall direct.

3. The said viewers having been duly sworn or affirmed faithfully, justly and impartially, to decide and true report to make concerning the value of the property and franchises so taken, which shall be submitted to them and in relation to which they are authorized to inquire under the provisions of this act, and having viewed the premises or examined

the property, shall hear all parties interested, and their witnesses, and shall estimate the damages for property taken, injured or destroyed with all the rights and franchises appertaining to the same, and to whom the damages are payable. They shall give at least ten days' notice thereof, in the manner herein provided to the Attorney-General and to all parties interested of the time and place when said viewers will meet and exhibit said report and hear all exceptions thereto.

4. After making whatever changes are deemed necessary the said viewers shall make a report to the court showing the damages, and file therewith a plan showing the location of said bridge or bridges so taken, and the names of the corporation stock company, partnership or persons to whom such damages are payable.

5. Upon the report of said viewers, or any two of them, being filed in said court, either the State of New Jersey, the corporation stock company, partnership or persons owning said bridge or bridges, or any party interested may, within thirty days thereafter, file exceptions to the same, and the court shall have power to confirm said report or to modify, change or otherwise correct the same, or refer the same back to the same or new viewers with like power as to their report, or within thirty days from the filing of any report in court or the final action of the court upon the exceptions of any corporation whose property is taken, or the State of New Jersey may appeal and demand a trial by jury, and any corporation stock company, partnership, person or party interested therein, or the State of New Jersey may, within thirty days after final decree, take an appeal to the Supreme Court. If no exceptions are filed and demands made for trial by jury within the said thirty days after the filing of said report, the same shall become absolute.

6. The said Court of Common Pleas shall have power to order what notices shall be given in connection with any part of said proceedings and may make all such orders as it may deem requisite.

7. The costs of the viewers and all court costs, including advertisements incurred in the proceedings aforesaid, shall be defrayed by the State of New Jersey, and each of the said viewers shall be entitled to a sum not exceeding five dollars a day for every day necessarily employed in the performance of the duties herein prescribed.

8. Upon and immediately after the enactment of the concurrent legislation by the State of Pennsylvania, said bridges shall become the sole property of the said States of New Jersey and Pennsylvania in proportion aforesaid, and the toll charges thereon shall cease and said bridges shall be free to the traveling public under such rules and regulations as may be prescribed by the said States; provided, that if the said commission and the corporation stock company, partnership or person owning any of the said bridges fail to come to an agreement as to the compensation for the taking of the same within sixty days of the enactment of said concurrent legislation, the jury of view shall be appointed as aforesaid and damages assessed as of the date upon which the collection of tolls ceased, with interest thereon during the time an appeal from the assessment thereof is pending; and provided further, that any steam or passenger railroad or railway now having in use and occupying any such toll bridge under a lease or agreement with any corporation stock company, partnership or person owning said bridge, shall pay to the States of New Jersey and Pennsylvania the same rental, interest and charges and in the same manner and proportions as they now pay to the said bridge corporation or corporation companies or owners as aforesaid.

9. All bridge properties or interests therein acquired by the States of New Jersey and Pennsylvania in the manner and form above prescribed, and all damages and costs arising from the taking of the same as aforesaid, shall be paid by the two States to the corporation stock companies, partnership or persons as their interests may appear in equal proportions as the interests of said States may appear.

10. Upon the acquisition as aforesaid by the State of New Jersey jointly with the State of Pennsylvania according as such bridges have a terminus in the said States, respectively, of the bridge properties as hereinbefore provided, such bridges shall be and remain in the charge and custody of any board or official that the respective Governors of said States may designate and such bridges and the immediate approaches thereto shall be maintained jointly by said State of New Jersey and said State of Pennsylvania in which each of these bridges has its terminus in equal proportions, and shall be kept in constant repair and rebuilt when destroyed, and the expenses incident to the maintenance of said bridge property in the charge and custody of said board shall be borne equally by said States; *provided*, that appropriate concurrent legislation for the same purpose be enacted by the State of Pennsylvania.

11. Not more than five hundred thousand dollars shall be paid by the State of New Jersey for and on account of its portion or share for the purchase or condemnation of said bridges; *provided*, that not more than one hundred thousand dollars thereof shall be expended for the said purpose each year, and the aforesaid amount or so much thereof as may be necessary is hereby specifically appropriated in the proportions aforesaid out of any moneys in the treasury not otherwise appropriated.

Approved April 1, 1912.

NEW JERSEY STATUTE OF 1919**CHAPTER 76**

AN ACT to amend an act entitled "An act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware river, and providing for free travel across the same," approved April first, one thousand nine hundred and twelve.

*BE IT ENACTED by the Senate and General Assembly
of the State of New Jersey:*

1. Section one of the act of which this act is amendatory, as said section was amended by act approved March seventeenth, one thousand nine hundred and sixteen, be and the same is hereby amended so that it shall read as follows:

1. Three persons shall be appointed by the Governor to be constituted a commission, together with a like board or commission from the State of Pennsylvania, to acquire said toll bridges crossing the Delaware river, and the rights, franchises and property including the immediate approaches thereto, of the several bridge companies, corporations, stock companies, partnerships or persons owning and operating the bridges between the State of New Jersey and the State of Pennsylvania, except such as are owned by steam or electric railways or railroads and used exclusively for railway or railroad purposes; such acquisition to be either by purchase or to be had and effected by the State of New Jersey under and by virtue of its rights of eminent domain as set forth in this act. The State of New Jersey to pay one-half of the cost of said properties and one-half the cost of acquiring the same, the other half to be paid by the State of Pennsylvania, including the allowance for the

then present value of the franchise or right to operate any such bridge. The commission of the State of New Jersey, constituted as in this act provided, and such commission as may be provided in any act or acts of the commonwealth of Pennsylvania, providing for the joint acquisition and maintenance by the commonwealth of Pennsylvania and the State of New Jersey of certain toll bridges over the Delaware river shall act to acquire by purchase or by condemnation proceedings as said joint commission may deem expedient, and according to and as in the enactments of the respective States is provided; and the joint commission shall sit as may be deemed expedient in order to determine the cost of the properties, including the franchise incident thereto situated in the State of New Jersey and the commonwealth of Pennsylvania, to determine any compensation to be allowed as of the time of entry upon the property and taking possession thereof, for the value of property, franchises, easements or rights in the two States, said franchise to be estimated on its present value as incident to such property and not upon estimated future receipts from toll charges.

2. Section two of the act of which this act is amendatory be and same is hereby amended so that it shall read as follows:

2. In case the compensation accruing from such appropriation shall not be agreed upon the joint commission acting in Pennsylvania and New Jersey, having given at least sixty days' notice to the owners of the lands and parties in interest of its intention so to do, shall enter upon and take possession of said lands in the name of the State of New Jersey, and such entry and possession shall entitle the joint commission to the exclusive use and right of possession of such property for the purposes set forth in this act. The said commission shall appoint a time not less than

twenty nor more than thirty days therefrom, when they shall meet upon the property and view the same, and the premises affected thereby; and shall give at least ten days' personal notice of the time and place of the first meeting to the Attorney-General of this State, and to the president, secretary or director of any corporation, stock company or to any partnership or persons affected, if any of the aforesaid officers or persons reside in this State, otherwise by advertisement for two consecutive weeks in two newspapers published in the county in which said bridge is located, and by handbills posted upon the premises.

3. Section three of the act of which this act is amendatory be and the same is hereby amended so that it shall read as follows:

3. The said joint commission having viewed the premises or examined the property, shall hear all parties interested, and their witnesses, and shall estimate the value of the property taken, including any easement, rights or franchises incident thereto, as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable. They shall file in the office of the clerk of the county in which the land or other property is situated, to remain of record therein, a report thereof, in writing, under the hands of said joint commission or a majority of them, within ten days thereafter, together with a plan showing the location of said bridge or bridges so taken, and the names of the corporation, stock company, partnership or persons to whom such compensation or damages are payable. Within ten days after the filing of said report personal notice shall be given to the owners and parties in interest, if resident in this State, and if not, by advertisement in a newspaper of general circulation in the county in which said bridge is located, of the filing of said report.

4. Section four of the act of which this act is amendatory be and the same is hereby repealed.

5. Section five of the act of which this act is amendatory be and the same is hereby amended so that it shall read as follows:

5. Upon the filing of said report or at any time within thirty days thereafter, any party aggrieved may take an appeal therefrom in the manner provided for taking appeals from the award of compensation by commissioners appointed for that purpose under the provisions of "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use (Revision of 1900)," and except as to the application to a justice of the Supreme Court for the appointment of commissioners as viewers, which is otherwise provided for in this act, all proceedings therein shall be conducted in accordance with the provisions of said revision, and the final compensation awarded, which shall be taken to include all moneys payable for the acquisition of said property, and all rights, franchises and easements incident thereto, when paid to the proper parties, or into the Court of Chancery, or tendered to the proper parties in interest, shall vest the title in fee to said properties in the State of New Jersey. The sum of the total final awards of compensation and all court costs in both States, including advertisements, incurred in the proceedings aforesaid, shall be defrayed by the respective States in equal portions, that is to say, one-half of the total expense shall be paid by each State, including the expenses of the commission.

6. Section six of the act of which this act is amendatory be and the same is hereby repealed.

7. Section seven of the act of which this act is amendatory be and the same is hereby repealed.

8. Section eight of the act of which this act is amendatory be and the same is hereby amended so that the same shall read as follows:

8. Immediately upon the acquisition and entry and taking possession of said bridge properties by the joint commission the toll charges thereon shall cease and said bridges shall be free to the traveling public under such laws of the respective States and rules and regulations of the joint commission as may be prescribed. Any steam or passenger railroad or railway now having in use and occupation any such toll bridge under a lease or agreement with any corporation, stock company, partnership or person owning said bridge shall pay to the joint commission for the respective uses of the States of New Jersey and Pennsylvania the rental, interest and charges in the same manner and proportions as they now pay to the said bridge corporation or corporation companies or owners as aforesaid, subject, however, to such change of charges or rentals as shall be made by said joint commission or its successors, subject to the approval of the Public Utility Commission, or other duly authorized and constituted body or bodies in the respective States.

9. Section ten of the act of which this act is amendatory be and the same is hereby amended so that it shall read as follows:

10. Upon the acquisition as aforesaid by the State of New Jersey jointly with the State of Pennsylvania according as such bridges have a terminus in the said States, respectively, of the bridge properties as hereinbefore provided, such bridges shall be and remain in the charge and

custody of any board or official that the respective Governors of said States may designate, and such bridges and the immediate approaches thereto shall be maintained jointly by said State of New Jersey and said State of Pennsylvania in which each of these bridges has its terminus in equal proportions, and shall be maintained and kept in constant repair and the expenses incident to the maintenance of said bridge property in the charge and custody of said board shall be borne equally by said States; *provided*, that appropriate concurrent legislation for the same purpose be enacted by the State of Pennsylvania.

10. This act shall take effect immediately.

Approved April 10, 1919.

NEW JERSEY STATUTE OF 1934

CHAPTER 215

AN ACT providing for joint action by the State of New Jersey and the Commonwealth of Pennsylvania in the administration, operation and maintenance of bridges over the Delaware river, and for the construction of additional bridge facilities across said river; authorizing the Governor, for these purposes, to enter into an agreement with the Commonwealth of Pennsylvania; creating a Delaware River Joint Toll Bridge Commission and specifying the powers and duties thereof, including the power to finance the construction of additional bridges by the issuance of revenue bonds to be redeemed from revenues derived from tolls collected at such bridges; transferring to said commission all powers now exercised by existing commission created to acquire toll bridges over the Delaware river; and making an appropriation.

* BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. The Governor is hereby authorized to enter into a compact or agreement on behalf of the State of New Jersey with the Commonwealth of Pennsylvania in substantially the following form:

(Copy of authorized Compact or Agreement omitted here because Compact as executed by both States is printed herein at p. 25.)

ARTICLE XI

Upon its signature on behalf of the State of New Jersey and the Commonwealth of Pennsylvania, this compact or agreement shall become binding and shall have the force and

effect of a statute of the State of New Jersey, and the commission shall thereupon become vested with all the powers, rights, and privileges; and be subject to the duties and obligations contained therein, as though the same were specifically authorized and imposed by statute, and the State of New Jersey shall be bound by all of the obligations assumed by it under this compact or agreement; and the Governor shall transmit an original signed copy thereof to the Secretary of State for filing in his office.

The Governor is hereby authorized to apply, on behalf of the State of New Jersey, to the Congress of the United States for its consent and approval to this compact or agreement; but in the absence of such consent and approval, the commission shall have all of the powers which the State of New Jersey and the Commonwealth of Pennsylvania may confer upon it without the consent and approval of Congress.

ARTICLE XII

2. The sum of twenty thousand dollars (\$20,000.00), or so much thereof as may be necessary, is hereby specifically appropriated to the Delaware River Joint Toll Bridge Commission, to be used by it, together with a like appropriation made by the Commonwealth of Pennsylvania; for the purposes of carrying out the provisions of this compact, except the operation, maintenance, improvement or construction of any new toll bridge over the Delaware river. The appropriation herein made to be taken from the funds of the Commission on Elimination of Toll Bridges, and to be returned to that commission within five years after the completion of the first toll bridge constructed, with interest at the rate paid on the bonds issued for the construction of that particular bridge. The moneys herein appropriated shall be disbursed upon requisition of the chairman of the

commission presented to the Comptroller, and paid by the State Treasurer in the usual manner.

3. This act shall become effective immediately upon its signing by the Governor and the passage by the Commonwealth of Pennsylvania of a substantially similar act, embodying the agreement between the two States herein set forth, and making a like appropriation.

4. It is the intention of the Legislature of New Jersey that this act shall in no wise authorize tolls to be collected on bridges crossing the Delaware river now free bridges.

Approved June 11, 1934.

CHARLES ELLIOTT, CLERK
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 563.

DELAWARE RIVER JOINT TOLL BRIDGE
COMMISSION, PENNSYLVANIA-NEW JERSEY,

Petitioner,

v.

JOHN D. COLBURN and BESSIE COLBURN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 563.

DELAWARE RIVER JOINT TOLL BRIDGE
COMMISSION, PENNSYLVANIA-
NEW JERSEY,

Petitioner,

v.

On Certiorari.

JOHN D. COLBURN and BESSIE COLBURN,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Official Report of Opinion Below.

The opinion of the New Jersey Court of Errors and Appeals in this cause was rendered and filed on September 22, 1939 (R. p. 278). The opinion is reported in 123 N. J. L. 197.

Statement of the Case.

L

John D. and Bessie Colburn own a modern dwelling house at 99 North Main Street, Phillipsburg, New Jersey. Before the building of a bridge abutment to the rear of their home by the Delaware River Joint Toll Bridge Commission, their

property constituted an integral part of the North End section of Phillipsburg. On the East, their property faced a high natural hill; on the West, while there were buildings between their property and the Delaware River, they enjoyed; because of the space between, and the varying heights of the irregular structures, a reasonable amount of light, ventilation and a view of the Delaware River, and the hill on the opposite side of the River. Further, by reason of the existence of seven separate thoroughfares, they had ready access to the entire section.

The Bridge Commission built an approach to the rear of the Colburn house. They caused the seven thoroughfares to be closed in whole or in part. The approach is one thousand feet long, ascends from street level to a height of forty feet where it meets with the bridge crossing the Delaware. It consists of solid dirt fill. The effect was to isolate completely the Colburn property in an artificially created valley. Access to the railroad, the river and the west is cut off. The abutment curtails light, ventilation and view. The Colburn property was thus depreciated in value.

The Colburns, in their application to the New Jersey Courts, contended that the injury to their property was compensable by reason of the express provisions of the New Jersey Statutes. Chapter 215 of the Laws of 1934, now R. S. 1937, 32:8-1, gives to the Bridge Commission the right to acquire property, defines "property" as including "claims for damages to real estate", and further provides as to New Jersey property, that eminent domain proceedings shall be pursued in accordance with the provisions of Chapter 297 of the Laws of 1912 as amended by Chapter 76 of the Laws of 1919, now R. S. 1937, 32:9-1, *et seq.*, which specifically sets out that the Commission should view "premises affected", notify "persons affected" and award damages for "property taken, injured or destroyed", and "state to whom the damages are payable".

The Colburns, with some of their neighbors, applied to the New Jersey Supreme Court in October, 1937, for a rule to show cause why a writ of mandamus compelling the Commission to proceed to estimate the damages should not issue. The rule was granted. The matter was argued upon stipulated facts and exhibits before the January, 1938, Term of the New Jersey Supreme Court. No federal question was raised by the Commission either in its brief or its argument to the Court. In March, 1938, the New Jersey Supreme Court ruled that alternative writs of mandamus should issue. The Court suggested the joinder of all owners as co-relators was probably improper and confusing. An order was entered awarding alternative writs to each of the owners. The embankment to the rear of Colburns' property and that of four other relators is approximately thirty-five feet high, and the Colburn case, as typical of that group, was prosecuted.

Thus, the Bridge Commission filed an answer to the alternative writ, and subsequent pleadings were filed (R. pp. 20-35). No federal question was raised by the pleadings or at the trial. The fact issues were tried at Circuit, before a judge and jury. The findings were certified by postea to the New Jersey Supreme Court (R. pp. 35-41), which entered judgment (R. pp. 42-46), directing the issuance of a peremptory writ. The Bridge Commission then appealed to the New Jersey Court of Errors and Appeals. Its grounds of appeal (R. pp. 2-13), raised no federal question, nor was such question argued to the court, which thereafter affirmed the judgment of the Supreme Court. The opinion (R. p. 278) neither presents nor decides a federal question. The first time petitioner attempted to raise a "purported" federal question is on this application.

The question decided by the Court of Errors and Appeals is not one of novel impression either in New Jersey or throughout the country. By state statute (P. L. 1919, C. 76), the Bridge Commission is directed to award dam-

ages for "property taken, injured or destroyed". Though the New Jersey Constitution does not require that consequential damages be awarded to a property owner whose property is injured by a public improvement, it has repeatedly been held that damages would be awarded if a statute created or allowed such a right.

Burns Holding Corp. v. State Highway Commission, 8 N. J. Misc. 452, aff'd 108 N. J. L. 401;
Newark v. Hatt, 79 N. J. L. 548;
Lewis on Eminent Domain (3d ed.), secs. 359, 360, 354.

Summary of Argument.

The petition for a writ of certiorari should be dismissed because:

I.

No federal question is presented—the question presented for review is the construction of a state statute by the highest court of New Jersey.

II.

Assuming a federal question is presented, there is no showing that a federal question was presented for decision or actually decided by the Court of Errors and Appeals of New Jersey.

III.

Assuming that the question for review is the construction of the interstate compact between New Jersey and Pennsylvania, a federal question is not presented.

IV.

It is clear that under the pertinent statutory provisions, the respondents are entitled to consequential damages.

ARGUMENT

POINT I

The petition for writ of certiorari should be dismissed because no federal question is presented—the question presented for review is the construction of a state statute by the highest court of New Jersey.

The interstate compact (U. S. 1935, Public—No. 411—11th Congress as set forth in Petitioner's petition, pp. 8, etc.) being joint legislation of each state, provides in Article II that the Commission shall have the general powers (j) To acquire, own", etc., "real property * * *", and "(m) to exercise the power of eminent domain." Article III of the compact enacts specifically the method the Commission shall acquire real property and exercise the power of eminent domain.: Paragraph 3 of Article III (Petitioner's petition, p. 12) specifically states that if the Commission cannot agree with an owner as to the terms of acquisition, the Commission can then acquire real property by the exercise of the right of eminent domain "in the manner provided by the Act of the State of New Jersey, entitled 'An act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware River; and providing for free travel across the same', approved the first day of April, one thousand nine hundred and twelve (Chapter two hundred ninety-seven), and the various acts, mandatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River."

In other words, both states by a compact consented to by Congress, agreed that as far as New Jersey property was concerned, compensation should be made in accordance with

the provisions of a New Jersey statute enacted by the New Jersey Legislature in 1912 (P. L. 1912, Chapter 297) as amended by P. L. 1919, Chapter 76 (now Revised Statutes of 1937, 32:9-6). This statute is not part of an interstate compact. It provides that if the Commission cannot agree with an owner as to compensation, "The said Commission shall appoint a time not less than twenty nor more than thirty days therefrom, when they shall meet upon the property and view the same, *and the premises affected thereby*; and shall give at least ten days personal notice of the time and place of the first meeting to the Attorney General of this State, and to the president, secretary or director of any corporation, stock company or to any partnership or persons effected * * *", and then continues:

"The joint commission, having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of the property taken, including any easements, rights or franchises incident thereto as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable."

It was this New Jersey statute on which the New Jersey Court of Errors and Appeals relied (R. p. 279). It was this New Jersey statute and its interpretation on which the Supreme Court originally allowed mandamus (R. p. 18), on which the alternative writ was predicated (R. p. 23), on which judgment that a peremptory writ issue was based (R. pp. 44-46).

It is, of course, elementary that the interpretation of a state Statute, does not present a federal question for review by the Supreme Court of the United States.

Adams v. Russell, 229 U. S. 353;

Kennedy v. Craven, 251 U. S. 125.

POINT II

The petition for a writ of certiorari should be dismissed because even assuming a federal question is presented there is no showing that a federal question was presented for decision or actually decided by the Court of Errors and Appeals of New Jersey.

It is elementary that before jurisdiction will be taken by the Supreme Court of the United States; it must be shown that a Federal question was argued or presented to the Court below for decision, that its decision was necessary to the determination of the cause, and that it was actually decided, or that judgment as rendered could not have been given without deciding it.

Honeyman v. Hanan, 300 U. S. 14;
Commercial National Bank v. Buckingham, 5 How. 317 at 341;
Parmelee v. Lawrence, 11 Wall 36 at 38.

Assuming *arguendo* that a federal question is involved, the record conclusively shows that a federal question was never presented to the New Jersey Court of Errors and Appeals or to any of the lower courts. The grounds of Appeal (R. pp. 2-13) reveal no complaint as to the construction of an interstate compact. They merely complain that the lower State Courts had not properly construed New Jersey Statutes. The opinion by the Court of Errors and Appeals involves merely the construction of a New Jersey Statute.

The petitioner for the first time in its appeal to this Court raises what it terms a federal question. This it cannot do.

POINT III

The petition for a writ of certiorari should be dismissed because even assuming that the question for review is the construction of the interstate compact between New Jersey and Pennsylvania a federal question is not presented.

Petitioner has urged that the determination of the effect of an interstate compact presents a federal question. As has been indicated, the real question at issue is the interpretation of a state statute which both states have directed shall govern in the event New Jersey property is affected. But assuming that the question involved is the construction of an interstate compact, that, in itself, does not present a federal question.

People v. Central Railroad, 12 Wall 455;
Hamburg American Steamship Co. v. Grube, 196 U. S. 407;
35 Columbia Law Review 76 at 80-84.

The assent of Congress to the compact does not make it a "treaty or statute of the United States", within the meaning of sec. 237 of the Judicial Code.

Hinderlider v. La Plata River and Cherry-Creek Ditch Co., 304 U. S. 92;
People v. Central Railroad, 12 Wall 455.

In none of the cases cited by petitioner did jurisdiction rest on the fact that the interpretation of an interstate compact was involved. In each case, jurisdiction was taken for some other reason.

In *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, *supra*, it was noted (p. 110):

"The decisions are not uniform as to whether the interpretation of an interstate compact presents a federal question."

The Court rested its jurisdiction to review on the ground that the apportionment of water of an interstate stream presented a question of "federal common law" and refused to rest its right to review on the fact that the interpretation of a compact was involved.

In *Kentucky v. Indiana*, 281 U. S. 163, while a controversy arose as to an interstate compact, this Court based its jurisdiction on the constitutional provision giving its original jurisdiction in suits between states.

Again, in *Pennsylvania v. Wheeling & Belmont Bridge Company*, 13 Howard 518, although an interstate compact was involved, it was decided that the Court had original jurisdiction because a state was a party and had a direct interest in the controversy.

In *Green v. Biddle*, 8 Wheat. 1, the Supreme Court reviewed a lower federal court decision involving an interstate compact, the allegation of which, it was alleged, had been impaired by a later statute. The jurisdiction to review was specifically rested upon the constitutional provision against the impairment of contracts.

Petitioner further contends that the New Jersey statute (P. L. 1912, c. 297 as amended by the P. L. 1919, c. 76), as construed by the New Jersey court impairs the obligation of the compact entered into by New Jersey and Pennsylvania in 1934. The contention is without merit. Even if the constitutional prohibition against impairment of contracts, applies to "compacts", in no event can there be an impairment by a judicial interpretation of a pre-existing statute; the question can arise only as to subsequent legislation. Further, the compact expressly provides that the New Jersey statute shall apply to New Jersey property. And finally, it is well settled that a change of judicial decision as to the construction of a state statute does not render the changed construction and impairment of contract obligations entered into upon faith of the prior construction a legislative change within the prohibitions

of the Federal Constitution forbidding legislative impairment of contracts.

Fleming v. Fleming, 264 U. S. 29.

POINT IV

The petition for a writ of certiorari should be dismissed because it is clear that under the pertinent statutory provisions, the respondents are entitled to consequential damages.

Petitioner argues that the Act of 1934 (P. L. 1934, C. 215, Compact, Petitioner's Petition, p. 8) sets forth alternative methods by which it may exercise the right of eminent domain. The point was not raised below, and is without merit. The compact (Petitioner's Petition, pp. 8, etc.) provides one method of acquiring real property in New Jersey. Article II gives the Commission the right to acquire real property and the power of eminent domain. Article III then sets out how, and in what manner that power is to be exercised as to New Jersey property—in accordance with the provisions of P. L. 1912 C. 297, as amended or supplemented. The compact sets forth only one way of exercising the powers granted by Article II—that set out in Article III—no alternatives are set forth.

Petitioner argues that the authorities show that New Jersey never has admitted a right to consequential damages where property is not actually taken, and that Pennsylvania has abandoned its recognition of such a right. The cases are to the contrary.

Consequential damages have been held recoverable in New Jersey when the right is recognized by Statute.

Newark v. Hatt, 79 N. J. L. 548;

Burns Holding Corp. v. State Highway Commission, 8 N. J. Misc. 452, aff'd 108 N. J. L. 401.

Similarly, in Pennsylvania and elsewhere, consequential damages have been held recoverable under statutes or constitutional provisions allowing damages for "property taken, injured or destroyed".

Pennsylvania Railroad v. Miller, 132 U. S. 75;
Chester County v. Brower, 12 Atl. (Pa.) 577;
Lewis on Eminent Domain (3d ed.), Secs. 359, 360,
354.

Further, the Pennsylvania courts have held that the constitutional provision or similar statutes providing damages for "property taken, injured or destroyed" applies to all owners whose property is sufficiently near to the improvement to make the injury proximate, immediate and substantial.

Mellor v. Philadelphia, 160 Pa. 614;
Bodemer v. Northampton County, 101 Pa. Super.
Ct. 492;
In re Melon St., 182 Pa. 397.

Respondents exaggerate the complications arising out of the decision and over emphasize the likelihood of the Bridge Commission paying excessive damages. It is to be noted that the mandate of the New Jersey court merely requires the Bridge Commission to estimate the damages, if any there are, and to say to whom they shall be awarded in accordance with New Jersey law.

It is respectfully submitted that the petitioner has not presented such a case as to justify the grant of a writ of certiorari.

Conclusion.

The application for the writ of certiorari should be denied,

Respectfully submitted,

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CHARLES ELMORE COOPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 563.

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION,
PENNSYLVANIA-NEW JERSEY,

Petitioner,

v.

JOHN D. COLBURN and BESSIE COLBURN,

Respondents.

BRIEF FOR RESPONDENTS

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1939.

No. 563

DELAWARE RIVER JOINT TOLL BRIDGE
COMMISSION, PENNSYLVANIA-NEW JERSEY,
Petitioner,

v.

JOHN D. COLBURN and BESSIE COLBURN,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW JERSEY
COURT OF ERRORS AND APPEALS

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the New Jersey Supreme Court (R., p. 9) is reported in 119 N. J. L. 600; 197 Atl. 896. The opinion of the New Jersey Court of Errors and Appeals (R., p. 209) is reported in 123 N. J. L. 197; 8 Atl. (2d) 563.

Jurisdiction

The judgment of the New Jersey Court of Errors and Appeals was entered September 22, 1939. The petition for writ of certiorari was filed November 30, 1939, and was

granted January 15, 1940 with the direction: "The Court directs the attention of counsel to the question of the jurisdiction of this Court."

It is the contention of respondents that this Court lacks appellate jurisdiction to review the decision of the New Jersey Court of Errors and Appeals. First, the compact does not surrender New Jersey's sovereignty as to jurisdiction of its courts over eminent domain proceedings, but provides a method of proceeding according to a New Jersey statute so that the only question presented is the review of a New Jersey statute as interpreted by the New Jersey Court of Errors and Appeals. Second, the meaning and application of an interstate compact does not present a federal question. (a) The compact clause was not intended to make the Supreme Court an arbiter with respect to compacts. (b) *People v. Central Railroad*, 12 Wall. 455, compels the conclusion that the interpretation by a State Court of a compact does not present a federal question and (c) other cases in this Court dealing with interstate compacts are not at variance with *People v. Central Railroad, supra*. Third, assuming a federal question is presented, there is no showing that a federal question was presented for decision to the New Jersey Court of Errors and Appeals. These jurisdictional points are covered by the first three points of the Argument in this Brief.

Question Presented

Apart from the jurisdictional questions heretofore set forth the question at issue is: Is a property owner whose property is not taken but who has suffered consequential damages as the result of the building and construction of an interstate bridge by the Delaware River Joint Toll Bridge Commission entitled to recover for the said damages by virtue of the legislation governing the building of such a bridge?

Statutes Involved

The Delaware River Joint Toll Bridge Commission was created by statutes enacted by the New Jersey legislature (P. L. 1934, Ch. 215, now R. S. 1937, 32:8-1, *et seq.*); by the Pennsylvania legislature (1931, Act No. 332, P. L. 1352; 1933, Act No. 138, P. L. 827); and consented to by Congress (1935, Public—No. 411—74th Congress). This compact empowered the Bridge Commission to build bridges, gave to it the right to acquire real property and exercise the power of eminent domain. The term "real property" as defined by Article III of the Compact, includes "claims for damage to real estate". Paragraph 3 of Article III likewise provides for the manner in which the power of eminent domain is to be exercised. It enacts that if the Commission cannot agree with an owner of real property in New Jersey it shall proceed:

"in the manner provided by the Act of the State of New Jersey, entitled 'an Act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware River; and providing free travel across the same; approved the first day of April, one thousand nine hundred and twelve (Chapter two hundred ninety-seven), and the various acts amendatory thereto, relating to the acquisition of inter-State toll bridges over the Delaware River."

The New Jersey legislation (P. L. 1912, Ch. 297 as amended by P. L. 1919, Ch. 76; now R. S. 1937, 32: 9-1, *et seq.*) referred to provides that if the Commission cannot agree with an owner as to compensation it shall appoint a time and place to meet upon the property and view the same and "the premises affected thereby" and further provides notice shall be given to "persons affected" and then continues:

4

"The joint commission, having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of the property taken, including any easements, rights or franchises incident thereto as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable."

Statement of Case

John D. and Bessie Colburn own a modern dwelling house at 99 North Main Street, Phillipsburg, New Jersey. Before the building of a bridge abutment to the rear of their home by the Delaware River Joint Toll Bridge Commission, their property constituted an integral part of the North End section of Phillipsburg. On the East, their property faced a high natural hill; on the West, while there were buildings between their property and the Delaware River, they enjoyed, because of the space between, and the varying heights of the irregular structures, a reasonable amount of light, ventilation and a view of the Delaware River, and the hill on the opposite side of the River. Further, by reason of the existence of seven separate thoroughfares, they had ready access to the entire section.

The Bridge Commission built an approach to the rear of the Colburn house. They caused the seven thoroughfares to be closed in whole or in part. The approach is one thousand feet long; ascends from street level to a height of forty feet where it meets with the bridge crossing the Delaware. It consists of solid dirt fill. The effect was to isolate completely the Colburn property in an artificially created valley. Access to the railroad, the river and the West is cut off. The abutment curtails light, ventilation and view. The Colburn property was thus depreciated in value.

The Colburns, in their application to the New Jersey Courts, contended that the injury to their property was

compensable by reason of the express provisions of the New Jersey Statutes. Chapter 215 of the Laws of 1934, now R. S. 1937, 32:8-1, gives to the Bridge Commission the right to acquire property, defines "property" as including "claims for damages to real estate", and further provides as to New Jersey property, that eminent domain proceedings shall be pursued in accordance with the provisions of Chapter 297 of the Laws of 1912 as amended by Chapter 76 of the Laws of 1919, now R. S. 1937, 32:9-1, *et seq.*, which specifically sets out that the Commission should view "premises affected", notify "persons affected" and award damages for "property taken, injured or destroyed", and "state to whom the damages are payable".

The Colburns, with some of their neighbors, applied to the New Jersey Supreme Court in October, 1937, for a rule to show cause why a writ of mandamus compelling the Commission to proceed to estimate the damages should not issue. The rule was granted. The matter was argued upon stipulated facts and exhibits before the January, 1938, Term of the New Jersey Supreme Court. No federal question was raised by the Commission either in its stipulation, brief or argument to the Court. In March, 1938, the New Jersey Supreme Court ruled that alternative writs of mandamus should issue. The Court suggested the joinder of all owners as co-relators was probably improper and confusing. An order was entered awarding alternative writs to each of the owners. The embankment to the rear of Colburns' property and that of four other relators is approximately thirty-five feet high, and the Colburn case, as typical of that group, was prosecuted.

The Bridge Commission filed an answer to the alternative writ, and subsequent pleadings were filed (R., pp. 14, *et seq.*). No federal question was raised by the pleadings or at the trial. The fact issues were tried at Circuit, before a judge and jury. The findings were certified by postea to the New Jersey Supreme Court (R., pp. 24, *et seq.*) which

entered judgment (R., pp. 29, *et seq.*), directing the issuance of a peremptory writ. The Bridge Commission then appealed to the New Jersey Court of Errors and Appeals. Its grounds of appeal (R., pp. 1, *et seq.*) raised no federal question, nor was such question argued to the court which thereafter affirmed the judgment of the Supreme Court. The opinion (R., pp. 209, *et seq.*) neither presents nor decides a federal question. The first time petitioner attempted to raise a "purported" federal question is in this proceeding.

ARGUMENT

I

The Court is without jurisdiction because the question presented for review is the construction of a state statute.

The interstate compact (U. S. 1935, Public—No. 411—74th Congress as set forth in Petitioner's petition, pp. 8, etc.) being joint legislation of each State, provides in Article II that the Commission shall have the general powers "(j) To acquire, own", etc., "real property * * *", and "(m) To exercise the power of eminent domain." Article III of the compact enacts specifically the method the Commission shall acquire real property and exercise the power of eminent domain. Paragraph 3 of Article III (Petitioner's petition, p. 12) specifically states that if the Commission cannot agree with an owner as to the terms of acquisition, the Commission can then acquire real property by the exercise of the right of eminent domain "in the manner provided by the Act of the State of New Jersey, entitled 'An act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware River; and providing for free travel across the same', approved the first day of April, one thousand nine hundred and twelve (Chapter two hun-

lred ninety-seven), and the various acts amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River."

In other words, both States by a compact consented to by Congress, agreed that as far as New Jersey property was concerned, compensation should be made in accordance with the provisions of a New Jersey statute enacted by the New Jersey Legislature in 1912 (P. L. 1912, Chapter 297) as amended by P. L. 1919, Chapter 76 (now Revised Statutes of 1937, 32:9-6). This statute is not part of an interstate compact. It provides that if the Commission cannot agree with an owner as to compensation, "The said Commission shall appoint a time not less than twenty nor more than thirty days therefrom, when they shall meet upon the property and view the same, and the premises affected thereby; and shall give at least ten days personal notice of the time and place of the first meeting of the Attorney General of this State, and to the president, secretary or director of any corporation, stock company or to any partnership or persons affected * * *", and then continues:

"The joint commission, having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of the property taken, including any easements, rights or franchises incident thereto as well as the damages for property taken, injured, or destroyed, and shall state to whom the damages are payable."

It was this New Jersey statute on which the New Jersey Court of Errors and Appeals relied (R. p. 209). It was this New Jersey statute and its interpretation on which the Supreme Court originally allowed mandamus (R. p. 9), on which the alternative writ was predicated (R. p. 14), on which judgment that a peremptory writ issue was based (R. pp. 29-31).

It is of course fundamental that in the absence of a compact governing the situation at hand the State of New Jer-

sey would have exclusive jurisdiction as to eminent domain proceedings with respect to land within the State. Did the State of New Jersey surrender its jurisdiction by virtue of the compact? The inquiry is much the same as that raised in *The People v. Central R. R. of N. J.*, 42 N. Y. 283 at 294 (writ of error dismissed 12 Wall. 455) :

*** The right of absolute sovereignty, which includes all the power of government, all the authority, executive, judicial and legislative, which the several States possess and exercise, subject to the constitutional supremacy of the national government, doubtless belongs to New Jersey, over the domain and territory of said State. This right of governmental control may doubtless be modified by compact between the States. And this brings us to the inquiry, how far, if at all, the State of New Jersey had made a binding provision by treaty for the cession and extinguishment of any of her territorial or governmental rights to the State of New York, over the waters or land referred to in said treaty ***."

Certainly there is nothing in the compact under review which surrenders New Jersey's jurisdiction as to acquisition of real property within the State. The Compact grants the Commission the right of eminent domain. But it prescribes the method of exercise. It directs that property shall be acquired pursuant to a New Jersey Statute. And the New Jersey Court of Errors and Appeals has construed this Statute.

It is, of course, elementary, that the interpretation of a State Statute, does not present a federal question for review by the Supreme Court of the United States.

Adams v. Russell, 229 U. S. 353;

Kenney v. Craven, 215 U. S. 125.

It is submitted that by the Compact the State did not relinquish its right to control through its Courts eminent

domain proceedings with respect to property within its jurisdiction; that the State Court at most construed a State Statute which both States agreed should be controlling as to the acquisition of real property within New Jersey.

II

The meaning and application of an interstate compact does not present a Federal question.

Petitioner in its Brief has set forth the proposition that the "meaning and application of an interstate compact presents a federal question for ultimate adjudication by this Court." This proposition is unsound. Neither the history surrounding the inclusion of the compact clause as part of the Constitution, nor the cases cited by Petitioner, nor the reported cases support such a proposition.

A. The Compact clause does not make the Supreme Court the final arbiter with respect to the interpretation of interstate compacts.

The words of the framers of the Constitution were simply that—

"No state shall, without the Consent of Congress * * * enter into any agreement or Compact with another State * * * U. S. Constitution, Art. I, Sec. X, Cl. 3.

At the most the Constitution requires Congressional consent to an agreement between States. Executive sanction or judicial interpretation are not requisites. The clause is not a grant of power, but a qualified prohibition.

The purpose of including the clause in the Constitution is well set forth by Mr. Justice Felix Frankfurter and James M. Landis in an article "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale Law Journal 685 (1925) at pages 694-695 as follows:

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"Historically the consent of Congress, as a prerequisite to the validity of agreements by States, appears as the Republican transformation of the needed approval by the Crown. But the Constitution plainly had two very practical objectives in view in conditioning agreement by States upon the consent of Congress. For only Congress is the appropriate organ for determining what arrangements between States might fall within the prohibited class of 'Treaty, Alliance, or Confederation', and what arrangements come within the permissive class of 'Agreement or Compact'. But even the permissive agreements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest."

Mr. Justice Fuller in *Virginia v. Tennessee*, 148 U. S. 503, at 519 expresses the purpose of the clause as follows:

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States, * * *."

The original intent of the framers of the Constitution was to guard against alliances which might threaten the Union. Congress was specifically chosen as the agency of the federal government to supervise such compacts. No grant of supervisory power was vested in the Supreme Court. Once, Congress has approved of the Compact, the demands of the Constitution were completely met.

- B. This Court in *People v. Central Railroad*, 12 Wall. 455, has held that the adjudication by the highest State Court as to the meaning of an interstate Compact does not present a Federal question.

In *People v. Central Railroad*, *supra*, New York sought review of a decision of its own Courts which held that an interstate Compact had not vested in New York jurisdiction over certain lands bordering on the New Jersey shore with respect to which the Central Railroad was alleged to have committed a nuisance. This Court held that on a motion to dismiss for want of jurisdiction the Respondent should prevail. That the case concerned the interpretation of an interstate Compact is conclusively indicated by an examination of the opinion of the New York Court of Appeals, *People v. Central R. R. Co., of N. J.*, 42 N. Y. 283.

In *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*, 304 U. S. 92, this Court refused to entertain jurisdiction on the ground that the interpretation of an interstate Compact presented a Federal question. Jurisdiction was specifically predicated on a question of "Federal common law"—whether the water of an interstate stream must be apportioned between States. The Court, in a footnote at page 110, said:

"The decisions are not uniform as to whether the interpretation of an interstate compact presents a Federal question. Compare *People v. Central Railroad*, 12 Wall. 455, with *Wedding v. Meyler*, 192 U. S. 573, and *Wharton v. Wise*, 153 U. S. 155."

As has been set forth herein, *People v. Central Railroad*, *supra*, definitely holds that the interpretation of an interstate compact does not present a Federal question justifying a review by this Court. And it is submitted that the two further cases cited are not at variance with this hold-

ing. *Wharton v. Wise, supra*, is clearly distinguishable. There this Court had before it on appeal, from a dismissal of a writ of *habeas corpus* granted by a lower Federal Court, the question of the effect of an agreement between Maryland and Virginia entered into by both States in 1785, before the adoption of the Constitution. The agreement of both States had never been assented to by the Congress of the Confederation or by Congress under the Constitution. The Court held that the agreement was not prohibited by the Articles of Confederation as not being a treaty, confederation or alliance as used in the Articles. It further held that the agreement between the two States was not affected by the Constitution since the contract clause applied only to future agreements or contracts. Thus, there is no decision to the effect that the interpretation of an interstate Compact presents a Federal question.

Wedding v. Meyler, supra, likewise is distinguishable. This Court had before it a decision of the highest Court of Kentucky holding that an Indiana judgment based on a summons served on the Ohio River on the Kentucky side was not entitled to full faith and credit in a suit in Kentucky on the Indiana judgment. Kentucky had been formed out of territory formerly belonging to Virginia. Virginia in 1789 had enacted a statute proposing the erection of the district of Kentucky into an independent State upon several enumerated conditions among which was that "The respective jurisdictions of this Commonwealth and of the proposed State on the river as aforesaid, shall be concurrent only with the States which may possess the opposite shores of the said river." Congress by a separate act allowed for the admission of Kentucky as a separate State. These two acts; the enabling legislation by Virginia and the Act of Congress, this Court said made mandatory a recognition of the jurisdiction set forth in the Virginia Statute. This Court reversed the judgment of the Kentucky Court. At least three grounds may be found justifying the Court's taking appellate jurisdiction. First, there was presented a

decision of the highest State Court of Kentucky failing to give full faith and credit pursuant to the Constitution to a judgment of the Indiana Court. Second, there was presented a decision of the highest Court of Kentucky failing to give effect to a Federal Statute. It is to be noted that the Court relied not only upon the legislation of Virginia but also on an Act of Congress passed pursuant to Article IV, Sec. 3, Cl. 1, of the Constitution. The Court said of this Act at page 582:

"* * * But as the consent given by Virginia was conditioned upon the jurisdiction of Kentucky on the Ohio River being concurrent only with the States to be formed on the other side, Congress necessarily assented to and adopted this condition when it assented to the Act in which it was contained. *Green v. Biddle*, 8 Wheat. 1, 87. Thus, after the passage of the two Acts, it stood absolutely enacted by the powers which between them had absolute sovereignty over all the territory concerned that when States should have concurrent jurisdiction on the river with Kentucky. This Compact, by sanction of Congress, has become the law of the Union. What further legislation can be desired for judicial action?" * * *."

The Congressional Act spoken of was not that contemplated by the provisions of the Compact clause but that provision governing the admission of States under Article IV, Sec. 3, Cl. 1. This clause of the Constitution is not a qualified prohibition as is Article I, Sec. 10, Cl. 3, but a grant of power to Congress to admit new States. The Act of Congress admitting Kentucky as a State became the "law of the Union". Obviously, in view of the latest decisions of this Court, this is not true of Congressional assent to an interstate Compact procured by the demands of the Compact clause. *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*, *supra*, at page 109. This Court in *Wedding v. Meyler*, *supra*, was definitely relying on an Act of Congress passed pursuant to Article IV, Sec. 3, Cl. 1 and not passed to conform to the Compact clause. Thus the case can be

disposed of as being completely devoid of any question involving the Compact clause. Third, there was presented for review the construction of a compact by the highest State Court of Kentucky. This view of the jurisdiction is most difficult to uphold. There is nothing in the case to suggest an agreement between the two States. The Compact spoken of by the Court was that formed as the result of the Act of Virginia and the Act of Congress (see p. 582). As to the question of how subsequently admitted States become bound by the Compact and in the case under discussion as to how Kentucky and Indiana became bound by the Compact the Court said at page 583:

" * * * Whether they be said to have it by way of acceptance of an offer, or on the theory of a trust for them, or on the ground that jurisdiction was attached to the land subject to the condition that ~~States~~ should be formed; or by simple legislative fiat, is not a material question, so far as this case is concerned * * *

This assertion is to be contrasted with the statement that since both powers (Virginia and Congress) which between them had absolute sovereignty over all the territory concerned, had enacted Statutes, the Acts of both became the law of the Union. Naturally, if this is so it is immaterial to fathom a theory as to why new States should be bound. All States are bound by the law of the Union. It is submitted that either of the first two grounds, full faith and credit, or reliance on the construction of a Statute of Congress passed pursuant to Article IV, Sec. 3, are the sounder grounds of appellate jurisdiction set forth in *Wedding v. Meyler, supra.*

C. The cases cited by petitioner do not hold that the interpretation of an interstate Compact standing alone presents a Federal question.

Petitioner cites *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*, 304 U. S. 92; *Kentucky v. Indiana*, 281 U. S. 163; *Pennsylvania v. Wheeling & Belmont Bridge*

Company, 13 Howard 518; and *Green v. Biddle*, 8 Wheat. 1 as holding that the interpretation of an interstate Compact presents a federal question. These cases are clearly distinguishable and do not so hold.

In *Hinderlider v. LaPlata River and Cherry Creek Ditch Co., supra*, this Court dealt with a decision of a State Court which had held an individual owner was entitled to water in contravention of an interstate Compact. One of the specific contentions urged by appellants at page 93 was that:

"The adjudication of rights under an interstate Compact is a Federal question for ultimate determination by the Supreme Court of the United States."

This Court in dismissing the appeal and allowing certiorari refused to rely on this contention to ground jurisdiction. The federal question as to the apportionment of water of an interstate stream was relied upon in allowing certiorari. In dismissing the appeal this Court said at page 109:

" * * * The assent of Congress to the Compact between Colorado and New Mexico does not make it a 'treaty or statute of the United States' within the meaning of Sec. 237(a) of the Judicial Code, 28 U. S. C. A., Sec. 344, and no question as to the validity of the consent is presented. *New York v. Central R. R. Co.*, 12 Wall. 455 * * *."

Kentucky v. Indiana, supra, dealt with the question of original jurisdiction of this Court. There private citizens as taxpayers had sought to enjoin the defendant State from fulfilling its contract with the complaining State on the ground that the interstate agreement was entered into contrary to the provisions of Indiana law. The attack was as to the validity of the contract. Indiana admitted its obligation to proceed. This Court granted the relief prayed. No such question is here presented. In the case *sub judice* Petitioner relies upon the appellate jurisdiction of this Court. Both parties here admit the validity of the Com-

pact. Appellate jurisdiction is sought to be justified. Original jurisdiction is not the question at issue. This Court was careful to note in its opinion that it had the authority and duty to determine for itself all questions pertaining to an interstate contract "*As to which the original jurisdiction of this Court is invoked.*" (Italics supplied.)

Again, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, *supra*, while an interstate Compact was involved this Court in taking jurisdiction relied on the Constitutional provision giving it original jurisdiction where a State was a party and had a direct interest in the controversy.

In *Green v. Biddle*, *supra*; the Supreme Court reviewed a lower federal Court decision involving an interstate Compact, the allegation of which, it was alleged, had been impaired by a later Statute. Jurisdiction to review was definitely rested upon the Constitutional prohibition against the impairment of contracts.

While several of these cases have discussed in a general way Compacts and have in several instances referred to Congressional sanction as making a Compact the "law of the Union" such dicta is at variance with actual decisions of this Court.

Hinderlider v. LaPlata River and Cherry Creek Ditch C^{o.}, 304 N. S. 92 at 109;

People v. Central Railroad, 12 Wall. 455;

See 35 Columbia Law Review, 76 at 80.

Nor does the contract clause furnish any ground for this Court assuming jurisdiction in the instant case. First, there is some question as to whether, despite *Green v. Biddle*, *supra*, the contract clause governs interstate Compacts. See 35 Columbia Law Review, 76 at 82. Secondly, the constitutional prohibition against the impairment of contracts is limited to statutory conflicts. Here Petitioner's complaint is not that the legislature has enacted a Statute im-

pairing the Compact but that the State Court has interpreted the Compact differently from that contended for by Petitioner. It is well settled that even a change of judicial decision as to the construction of a State Statute does not render the changed construction an impairment of contract obligations entered into upon the faith of the prior construction a legislative change within the prohibitions of the Federal Constitution forbidding legislative impairment of contracts. *Fleming v. Fleming*, 264 U. S. 29. Thus, here Petitioner has no constitutional basis for objecting to a decision of the State Court which is at variance with its own interpretation.

Considering the purpose of the Compact clause of the Constitution; the holding of this Court in *People v. Central Railroad, supra*, and the remaining cases dealing with the Compact clause which are readily distinguishable, it is submitted that no federal question is presented. This Court should hesitate before annexing within the sphere of its extensive appellate jurisdiction a class of cases hardly contemplated by the Constitution nor demanded by the precedents in this Court. It is submitted that *People v. Central Railroad, supra*, is dispositive.

III

Assuming a Federal question is presented, there is no showing that a Federal question was presented for decision to the Court of Errors and Appeals of New Jersey.

Jurisdiction to review a decision of the highest state court by certiorari in this Court is limited by Sec. 237 of the Judicial Code to three instances: (a) where is drawn in question the validity of a treaty or statute of the United States or (b) where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States or

(e) where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

Unquestionably there was not drawn in question the validity of a treaty or statute of the United States. For this Court has held that the assent of Congress does not make the compact a federal statute within the meaning of the Judiciary Code.

Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92;

People v. Central Railroad, 12 Wall 455.

There is no complaint here that the statute constituting the compact is contrary to the Constitution, treaty or laws of the United States. In fact both parties admit the validity of the compact. There is no statute other than the compact which was construed by the Court of Errors and Appeals. Doubtless, the instant case is not within this class.

This leaves only one additional ground justifying appellate jurisdiction. But here jurisdiction is allowed where any title, right, privilege or immunity sought by either party under the Constitution is specially set up, or claimed. The record conclusively shows that the so-called Federal question was never presented to the New Jersey Court of Errors and Appeals or to any of the lower courts. The Grounds of Appeal (R., p. 1) reveal no complaint as to the construction of an interstate compact. They merely complain that the lower State Courts had not properly construed New Jersey Statutes. The petitioner for the first time in these proceedings seeks to raise what it terms a Federal question. This it cannot do.

It is elementary that before jurisdiction will be taken by the Supreme Court of the United States, it must be shown

that a Federal question was argued or presented to the Court below for decision, that its decision was necessary to the determination of the cause, and that it was actually decided, or that judgment as rendered could not have been given without deciding it.

Honeyman v. Hanan, 300 U. S. 14;

White River Co. v. Arkansas, 279 U. S. 692 at 700;

Melon v. O'Neil, 275 U. S. 213 at 214;

Young v. Masci, 289 U. S. 253 at 261;

McGoldrick v. Gulf Oil Corp., No. 473, this Term.

The test adopted by this Court demands: first, that the State Court's attention must be called to the Federal question, and secondly, that it must have passed upon the Federal question. For failure to comply with either of these requirements an attempt to seek review in this Court fails. As to the first requirement this Court said in *White River Co. v. Arkansas*, *supra*, at page 700:

"It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the State; and as it was sought to raise this question for the first time by assignments of error in this Court, it is necessarily excluded from our consideration. *Whitney v. California*, *supra*, 316; and cases therein cited."

The demands of both requirements are fully set forth as follows in *Honeyman v. Hanan*, *supra*, at page 18:

"Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause. *Lynch v. New York*, 293 U. S. 52, 54 and cases there cited. Whether these requirements have been

met is itself a Federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the Federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record ***"

It is submitted that this review must fail—that the writ of certiorari should be dismissed—because the record is absolutely devoid of (1), the setting up of a Federal question or (2), the actual decision by the highest state court of New Jersey of a Federal question.

IV

The respondents are entitled, under the express provisions of the acts creating and governing the Bridge Commission, to compensation for the damage and injury inflicted upon their property by the Bridge Commission.

A. The language of the statutes creating the bridge commission and granting it the power of eminent domain expressly provides for the allowance of consequential damages.

The last paragraph of Article III of the Compact, *supra*, defines what is included in the term "real property" as used in the compact, and compensation for which is, by the earlier paragraphs of the article, to be given. *Included within the term "real property" are "claims for damage to real estate."*

Chapter 297 of the Laws of 1912, as amended by Chapter 76 of the Laws of 1919, now Revised Statutes of 1937, 32:9-6 which by the provisions of Article III of the act creating petitioner governs its exercise of the power of eminent domain, provides in section 2 thereof, that if the Commission cannot agree with an owner as to compensation "the said Commission shall appoint a time not less than

wenty nor more than thirty days therefrom, when they shall meet upon the property and view the same; *and the premises affected thereby*; and shall give at least ten days' personal notice of the time and place of the ~~first meeting~~ to the Attorney General of this State, and to the president, secretary or director of any corporation, stock company or of any partnership or *persons affected* * * * and then continues in section 3 thereof:

"3. The said joint commission having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of their property taken, including any easement, rights or franchises incident thereto, *as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable.*"

Every other act dealing with the power of eminent domain in New Jersey provides only for compensation for real property taken. No other act provides as does the act governing the Bridge Commission for viewing by the Commission which is to ascertain compensation, of the "premises affected thereby" as well as the premises taken; no other act includes within the term "real property", "claims for damages to real estate", and no other act requires the commission to value in addition to the property taken, damages for property "injured or destroyed".

Because of the absence of similar statutory provisions in other "eminent domain" statutes found in New Jersey, its courts have held that under those statutes no compensation for injury or damage to property not taken would be awarded. *In each instance, New Jersey courts have stated that had the statute conferred such right to compensation, compensation would be granted.*

Burns Holding Corp. v. State Highway Commission, 8 N. J. Misc. 452, aff'd 108 N. J. L. 401, 150 Atl. 768;

- Sommer v. State Highway Commission*, 106 N. J. L. 26, 148 Atl. 171;
Wolfson v. Comm. etc. of Perth Amboy, 9 N. J. Misc. 161, 153 Atl. 106.

In each of these cases, mandamus was sought to compel awards for damages resulting from improvements which affected or injured property although the property affected was not taken. In each, the Court expressed regret in announcing that in the absence of statute the public bodies concerned were not compelled to make compensation. So, in *Burns Holding Corp. v. State Highway*, *supra*, mandamus was sought when the damage alleged was similar to that involved in the case *sub judice*. The Supreme Court of New Jersey said, at page 452:

"Notwithstanding the apparent hardship of the cases, we have to conclude that this rule must be discharged. Counsel for prosecutor cites no authority in this state in support of the rule and while in some other jurisdictions the right to damages is recognized, such judicial opinion as we find in this state is apparently to the contrary, *in the absence of statute conferring the right.*" (Italics supplied.)

The statutory provisions which were absent in the *Burns* case and the other cited cases are, however, as Justice Parker pointed out in the opinion below (R. p. 12) present in the compacts and statutes governing the case *sub judice* and are "plain and controlling" put there because the Constitution of the State of Pennsylvania required compensation for property in that State "taken, injured or destroyed" for public use.

The statute was drawn to comply with that constitutional mandate. The drafters of the compacts and the acts embodying them into law therefore gave to the owners of real property in each state equal rights; the right to compensation for property "taken, injured or destroyed."

The constitutional provision referred to is found in Article 16; section 8 of the Pennsylvania Constitution which provides in part as follows:

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for *property taken, injured or destroyed* by the construction, enlargement of their works, highways, and improvements, which compensation shall be paid before such taking, injury or destruction * * *." (Italics supplied.)

Under this constitutional provision, it is well settled that a taking is not a prerequisite to an award for damages caused by a public improvement. The provision was intended for the protection of not only the person whose property was taken, but equally as well for those persons who suffered consequential damages by reason of a public improvement.

Pennsylvania Railroad Co. v. Miller, 132 U. S. 75;
Chester County v. Brower, 117 Pa. 647, 12 Atl. 577.

In *Chester County v. Brower, supra*, a county was held liable, under the quoted constitutional provision for consequential damages resulting from the erection of bridge abutments adjacent to the premises of the complaining landowner. It was pointed out that, under the law as it stood prior to the adoption of the above constitutional provision, the abutting owner would have been without remedy for such consequential injuries. The Court said:

"The clause in the Constitution above recited is very broad in its terms. The framers of that instrument were seeking to redress what this Court has repeatedly declared to be a great hardship, and which was regarded by many persons as a great wrong, viz. the exemption of corporations from consequential damages where they

injured private property, without an actual taking thereof, in the erection or construction of their works. "The convention had before it the case of O'Connor v. Pittsburgh (1851), 18 Pa. 187, in which a valuable property in the City of Pittsburgh was seriously injured by the change of grade of a street. This court held that, as the law then stood, no relief could be afforded. How reluctantly we did so may be gathered from the language of Chief Justice Gibson in delivering the opinion of the Court. He said: 'We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but I grieve to say that we have discovered none.' When, therefore, the convention took in hand the redress of this grievance, they did it thoroughly. They said, practically, that hereafter neither corporations or individuals in Pennsylvania clothed with the power of eminent domain, should injure private property without making compensation therefor, by 'the construction or enlargement of their works, highways, or improvements', whether any portion of such private property was actually taken or not. The language of the Constitution is to be construed liberally, so as to carry out, and not defeat, the purpose for which it was adopted."

The words "taken, injured or destroyed" in statutes governing the case *sub judice* are not mere surplusage. They cannot be attributed to error in drafting. They have definite meaning. They permit consequential damages to be recovered, whereas the word "taken" used alone does not permit such recovery.

B. The Pennsylvania courts in interpreting statutes similar to the statute in question have held that the statutes create new rights to consequential damages.

In the first place, it must be recognized that the Pennsylvania cases were not controlling in the New Jersey Courts. There was before the New Jersey Court for the first time a

statute which had not been before interpreted. The Pennsylvania cases may have given some meaning to the words used. But the ultimate decision as to the meaning of the statutes was a question for the New Jersey Court to decide.

Respondent contends that the language of the statute now under construction speaks for itself. The legislative command is set forth in the statute. The words used in the statute should be given their natural and normal meaning. The Commission should be compelled to award damages for property "injured".

But even assuming that the New Jersey Court did consider the Pennsylvania cases as controlling, the interpretation by the Pennsylvania courts of similar statutes requires the interpretation given by the New Jersey Court of Errors and Appeals.

Petitioner, in its brief, asserts that the statutes in this case did not create new legal rights allowing respondents damages for the injury to their property. To support this position a series of disjointed excerpts culled from Pennsylvania reported cases are utilized. Two principal arguments permeate petitioner's discussion and questions. First, it is said that the Courts of Pennsylvania have held that the Pennsylvania constitutional provision allowing compensation for "property taken, injured or destroyed" is nugatory unless the legislature by statute specifically provides a remedy. Even if this proposition is correct, the answer here is that there is a clear and specific statute. Secondly, it is argued that the intent to impose liability for such damages must be incorporated in the title of the act. Obviously, such a test would not bind the New Jersey Courts.

None of the Pennsylvania cases militate against Pennsylvania Courts holding similarly with the New Jersey Court of Errors and Appeals. The holding in *In re Soldiers and Sailors Memorial Bridge, Etc.*, in the City of Harrisburg, 308 Pa. 487, 162 Atl. 309 is that the State in building a bridge is not responsible for consequential damages suffered

by an owner near the proposed bridge. This is true in Pennsylvania because the constitutional provision demanding an award of consequential damages to one whose property is "injured or destroyed" only applies to "municipal or other corporations". The statute empowering the State to build the bridge contained no authorization whatsoever allowing consequential damages. No consent permitting the State to be sued was given. This case is not applicable here where there is a statute allowing such damages, setting up the Commission as a municipal corporation and giving it the power to sue and be sued.

Hoffer v. Reading Co., 287 Pa. 120, 134 Atl. 415, is likewise a case holding that the state is not liable for consequential damages. It is almost identical with the Memorial Bridge Case just discussed.

In *Westmoreland Chemical and Color Co. v. Public Service Commission, et al.*, 294 Pa. 451, 144 Atl. 407, the Supreme Court of Pennsylvania upheld a recovery for consequential damages where the injury was highly similar in kind to those of respondents and where the statute was much the same as in the instant case. There, the state public utility commission ordered that a bridge approach to a new bridge be so built as to eliminate several grade crossings. The approach was a solid concrete wall of a width occupying most of the street and extending along the Westmoreland Chemical and Color Company's property and others as it abutted on the approach. The approach at one end of the plaintiff's property was 6½ feet high and, at the end nearest the bridge, approximately 17 feet high. Proceedings before the public service commission to determine damages were had. The county appealed to the common pleas, and the jury awarded \$10,000. An appeal was taken to the Supreme Court. The Court held that even though no property was taken, that the existing legislation permitting an award to an owner whose property was "injured" allowed recovery of the damages sustained.

The dicta in both the Westmoreland case and the Memorial Bridge case, just discussed, set forth a doctrine which appellant seeks to urge upon this Court. The excerpts set out that, before the constitutional amendment in Pennsylvania, damages for consequential injuries were not recoverable. It is admitted that thereafter so far as the acts of municipal or other corporations were concerned, one suffering consequential injuries had a recovery. Then, there was a modification. The Courts later said that there would be no recovery unless a statute authorized the recovery. The doctrine propounded is that, though there is a constitutional right to damages in a property owner who suffers consequential injury in Pennsylvania, the Courts will not recognize such a right unless the legislature provides for the right to damages in the statute authorizing the improvement. In other words, the Court by this interpretation seems to override the mandate of the Constitution. By the citation of such authority does appellant propose that this Court likewise nullify the mandate of the legislature that damages shall be awarded for property "taken, *injured* or destroyed"?

Even if such dicta has weight in Pennsylvania, there would be no reason here for its application. No constitutional problem arises here. The fiat of the New Jersey legislature requires damages be awarded for property "*injured*." All that the Harrisburg Bridge case decided was that there was no statute to compel the state to award consequential damages. Here, however, there is such a statute.

By the citation of the excerpt from The Soldiers' and Sailors' Memorial Bridge case, petitioner may seek to urge another doctrine set forth by way of dicta in that case. It is there said that unless the right to consequential damages was recognized in the title, the statute imposing such liability would be held unconstitutional. Of course, it must be noted that this was said obiter dicta. A reading of the

case shows nowhere that the statute authorizing the building of the bridge by the state authorized the recovery of consequential damages.

Even if such a doctrine prevails in Pennsylvania, there is no reason for its application here. New Jersey has its own constitutional provisions governing the enactment of laws and as to what must be expressed in the title of an act passed by the Legislature. Article 4, Section 7, subdivision 4 of the New Jersey State Constitution provides: "To avoid improper influence which may result from intermixing, in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title * * *." Under this provision of the constitution, it has been held that the title to an act does not require that it be a table of contents, but that if the general object of the statute is expressed, that such an act will be held constitutional.

Gottuso v. Baker, 80 N. J. L. 520, 77 Atl. 1038;
Boniewsky v. Polish Home of Lodi, 103 N. J. L. 323, 136 Atl. 741.

The New Jersey courts have further held that statutes providing for public improvements must not specifically set out in detail in the title the procedure for making such improvements.

Manufacturers Land and Imp. Co. v. Camden, 81 N. J. L. 413, 79 Atl. 286.

In the above case, the plaintiff in error prosecuted a writ of certiorari as an adjacent property owner who had been charged with an assessment for street improvements. He complained that the title of the act did not specifically enumerate adjoining property owners as being liable for the cost of the improvement. The Court of Errors and Appeals, at page 414, answered this contention thusly:

"* * * The criticism fails to differentiate between the object of a statute and the means by which that object shall be carried into effect. The former is required to be expressed in the title, the latter is not. As was pithily said by Mr. Justice Garrison in *Moore v. Burdett*, 33 Vroom 164, the constitutional mandate requires that the title of an act shall be a label, not an index. The object of the act under consideration is to improve the public streets of our cities, and to provide for the payment of the expense incurred thereby. This is clearly expressed in the title. The methods to be adopted in making the improvements, and the means by which the moneys shall be raised to pay for them, are mere machinery provided for the accomplishment of the legislative purpose. The statute does not violate the constitutional provision appealed to."

In view of these New Jersey authorities it can hardly be urged the statute giving the Bridge Commission general authority to act should specifically enumerate in its title as to who receives damages in condemnation proceedings.

In *Pennsylvania Railroad v. Lippincott*, 116 Pa. 462, 9 Atl. 871, the third case relied on by petitioner, the essence of the claim sued on was damages caused by the *operation of a railroad*. The complaint sought damages caused by the operation of the railroad. The Court was careful to point out at 116 Pa. 472, 9 Atl. 873, that "it is not alleged that any injury has resulted from the erection of this elevated roadway". Thus, further, the court noted on the same page: "The damage complained of results wholly from the manner in which the roadway is used, results from the noise, smoke and dust arising from the use of the property as a steam railway". Further, at the same point: "It is not pretended that the erection did the plaintiff any harm, but its use only; that is, the running of locomotives on it". The Court merely held in consonance with the prevailing rule that damages cannot be recovered by reason of the lawful operation of a railroad on land in close proximity to an

owner. But the Court did not hold that one whose property is injured by the construction of a railroad or any other improvement cannot recover for damages caused to the property. Deprivation of air, light and view, and lack of access were not elements considered. Respondents' claim of injury is based upon the construction and location of the bridge approach, not the operation of it as a roadway.

Pennsylvania Railroad v. Marchant, 119 Pa. 541, 13 Atl. 690, was identical in facts with the *Railroad v. Lippincott* case, arising out of the same viaduct operations. Likewise, being based on a complaint for damages from the lawful operation of a railroad, it has no bearing in a case such as the instant one where the claim is predicated on damages caused by the construction of the bridge approach.

The distinction just discussed is noted in subsequent cases dealing with *Pennsylvania Railroad Co. v. Lippincott* and *Pennsylvania Railroad Co. v. Marchant*. It was thus said in *Pennsylvania S. V. R. Co. v. Walsh*, 124 Pa. 544, at 558; 17 Atl. 186, at 187:

"* * * Our latest case is Penna. Railroad Company v. Marchant, 119 Pa. 541, in which it was held that the word 'injury' or (injured) as used in sec. 8 article XVI of the constitution, means such legal wrong as would be the subject of an action for damages at common law; that for such injuries both corporations and individuals now stand upon the same plane of responsibility. In that case, as in the prior case of Railroad Company v. Lippineott, 116 Pa. 472, there was no injury to the property by reason of the erection and construction of the road, and we held that the constitutional provision was not intended to apply to injuries which were the result merely of the road, as distinguished from its construction, and that in such case there could be no recovery for the annoyance of smoke, noise and cinders, etc., caused by the running of the company's trains, unaccompanied with negligence; in other words, that the injuries resulting from the exercise of a lawful business, in a lawful manner, without negligence and

without malice, are damnum absque injuria. We cannot, however, apply that rule to this case for obvious reasons.

"In Railroad Company v. Lippincott, and Railroad Company v. Marchant, *supra*, as in this case, there was no actual taking of any portion of the plaintiff's property. But there the analogy ceases. In the cases cited, there was no injury by reason of the construction of the road; here there was an injury and a serious one, the direct result of the construction." (Italics supplied.)

That the Pennsylvania constitution and statutes created new rights is most forcefully illustrated by the last Pennsylvania case cited by petitioner.

In *Holmes & Holmes v. Public Service Commission*, 79 Pa. Super. Court, 381 at 386, this point is made in the following excerpts:

" * * * The constitution of Pennsylvania, article XVI, sect. 8, provides that 'municipal and other corporations and individuals invested with privilege of taking private property for such use shall make just compensation for property taken, injured or destroyed by the construction or enlargement or their works, highway or improvements'. *The Supreme Court held that this provision of the Constitution is not limited to property merely fronting or abutting on the particular works, highway or improvement by the construction of which the property is injured or destroyed but applies to any works which are sufficiently near to the property to make the injury proximate, immediate and substantial.* *Melor v. Philadelphia*, 160 Pa. 614; *Chatham Street*, 191 Pa. 604." (Italics supplied.)

It was further said at page 386 as to including the word adjacent in the statute awarding damages rather than abutting:

" * * * It is apparent, therefore, that the Public Service Company Act made no change in the law on this point;

but simply recognized that adjacent property,—which includes abutting property,—might be injured by the construction, relocation, alteration, or abolition of a grade/crossing and made provision accordingly. *Had the act limited the right to damages of abutting property it would, under the decisions above cited, have been unconstitutional in that respect. * * ** (Italics supplied.)

Respondents have reviewed at length the decisions cited by petitioner to demonstrate the fallacy of petitioner's argument that the Pennsylvania constitution and statutes similar to that in the instant case create no new legal rights. The very cases cited by petitioner show that the Pennsylvania Courts have recognized the constitutional provision and similar statutes as creating new rights. These rights are not limited to the extent of common law rights existing before the passage of the constitutional provision or statutory legislation allowing awards for property damaged.

The Pennsylvania courts in interpreting the constitutional provision and legislation thereunder allowing damages to property injured by an improvement have consistently held that new rights are created in favor of owners who suffer diminution in value of their property irrespective of their location with reference to the improvement.

Mellor v. Philadelphia, 160 Pa. 614, 28 Atl. 991;
Bodemer v. County of Northampton, 101 Pa. Super.
 Ct. 492;

In re Melon Street, 182 Pa. 397, 38 Atl. 482;
In re Construction of Walnut St. Bridge, Appeal
 of the City of Philadelphia, 191 Pa. 153, 43 Atl.
 88;

Chatham Street, Philadelphia's Appeal, 191 Pa.
 604; 43 Atl. 365;

Lewis v. Homestead, 194 Pa. 199, 45 Atl. 123.

In *Mellor v. Philadelphia*, 160 Pa. 614, 28 Atl. 991, plaintiffs sued the defendant municipality for damages suffered

depressing streets which connected with the street on which they fronted. On appeal, a judgment in their favor was upheld. The appellant contended that the constitutional provision was not applicable to any other owner than abutting owner. The court, at page 621, said as to this contention:

"The respective claims of the plaintiff to compensation were based on the constitutional provision that 'municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements'. Const., art. 16, sect. 8. * * * *There is nothing in the phraseology of the section that can be even tortured into a limitation of its provisions to property fronting or abutting on the particular work, highway or improvement, by the construction or enlargement of which said property was injured or destroyed. The section in question cannot be thus narrowly construed without reading into it words which are not in it and were never intended to be there.*" (Italics supplied.)

In *Bodemer v. County of Northampton*, 101 Pa. Superior 492, plaintiff was the owner of land on which was located a hotel and filling station bordering on a highway. The highway was relocated in 1929 to abolish certain railroad crossings a distance of some 700 feet from the old highway, and plaintiff's property, rendering plaintiff's property less accessible. The Public Service Commission suspended an award. On appeal the amount was reduced in Common Pleas. From that court, there was an appeal to the Superior Court. The Appellate Court upheld recovery, saying at page 497:

"A review of the evidence satisfies us that it is sufficient to support a finding that the plaintiff in the proceedings abolishing the grade crossings in question suf-

ferred injury to his property rights by being shut off from direct access to the highways to Easton, which were special and peculiar to himself and different in kind from the injury sustained by the public using the road only for travel; and that his property through which the road affected passed, was sufficiently near to the public works in question to make the injury proximate, immediate and substantial."

The Court after discussing the leading cases in Pennsylvania, said at page 496:

"* * * They hold that where there is legislative warrant for a recovery of consequential damages, the constitutional provision (Art. XVI, sec. 8) is not limited to abutting landowners, but includes anyone who can show an injury to his property rights peculiar to himself and different in kind from the injury sustained by those who use the road for travel only; provided the property is sufficiently near to make the injury proximate, immediate and substantial."

In re Melon Street, 182 Pa. 397, 38 Atl. 482, was a proceeding for the assessment of damage by adjacent owners against the City of Philadelphia for vacation of streets on which complainant's property did not abut. The vacation of the streets caused a deprivation of direct access to the east of the claimant's property.

The Court pointed out that the property owners were deprived of direct access to the system of streets to the east, that their property was depreciated in value. The Court held that even though they were not abutting owners, they were entitled to recover damages for the diminution in value of their property. The ratio decidendiæ was set forth at 38 Atl., page 489:

"The difficulty in defining the limits where the right to compensation shall end cannot be urged as a valid objection to the claims of appellants. To entitle the

owner of land to recover the loss must be one which he as owner has suffered by reason of the depreciation in value of his land. The basis of his claim for compensation is that his land has been lessened in value, not that he has suffered in common with others or to a greater extent than others because of something peculiar to himself. The difficulty in assessing damages is no greater than that which a jury meets in all such cases in ascertaining the extent to which properties in the vicinity have been benefited and in making assessment therefor. To sustain the right of a claimant to compensation because of the vacation of a street it must appear that the loss results from the depreciation in value of his land because of the change in the street, and his loss must be direct and proximate, and so obvious and substantial to admit of calculation." (Italics supplied.)

In *Chatham Street-Philadelphia's Appeal*, 191 Pa. 604, 43 Atl. 365, petitioner sought damages from a change in grade of a street other than the one on which his property abutted. The Court held that the act allowing damages and the constitutional provision was not limited to abutting owners. It was said at 43 Atl., page 365:

"There cannot be any question as to his legal right to compensation and we cannot say that the amount awarded him is excessive. As to his legal rights, etc., it is unnecessary to do more than refer to sec. 8 of article 16 of the constitution and the act under which this proceeding was had. The constitutional provision is not limited to property abutting or fronting on the particular highway or improvement, by the construction or enlargement of which the property is injured. It applies to any works, etc., that are sufficiently near to the property to make the injury proximate, immediate and substantial (citations omitted)."

C. The authorities recognize that statutes providing for damages for "property taken, injured or destroyed" apply to all classes of property which is depreciated in value by reason of the improvement.

Lewis on Eminent Domain (3 ed.) Vol. 1, secs. 359, 360 and 354;

Nicholas on Eminent Domain, Vol. 1, p. 324.

As to the manner in which words in statutes providing for damages for property injured or destroyed are to be interpreted, Lewis on Eminent Domain, *supra*, at page 644, says:

"Sec. 359: There can be no doubt but what the words in question were intended to enlarge the right to compensation. Any other construction would render the words nugatory. They are 'an extension of the common provision for the protection of private property'. 'The words, injured or destroyed, were not used in vain and without meaning. It was intended that they should have effect, and unless they operate to impose a liability not previously existing, they are without operation'. * * *".

"Sec. 360: The provision of the constitution requiring compensation to be made for property taken, injured or damaged for public use, are intended for the protection of private rights. They are remedial in character. They should, therefore, be liberally construed in favor of the individual whose property is affected, and the authorities so hold. 'The language of the constitution is to be construed liberally so as to carry out and not defeat the purpose for which it was adopted'."

V.

The New Jersey Act of 1912, as amended, was the exclusive method prescribed for exercising the general power of eminent domain granted the Commission by the compact.

Petitioner has labored a construction of the Compact in endeavor to show that the 1912 Act, as amended, was only an alternative method of exercising eminent domain. But if this is an alternative method as suggested there is no showing by petitioner of where the Compact prescribed the first method as to which this is an alternative. Petitioner sought to make a similar point in the New Jersey Supreme Court (R. p. 13). It abandoned the point in the Court of Errors and Appeals. No such contention is set forth in the Ground of Appeal (R. p. 1) prepared for the New Jersey Court of Errors and Appeals.

The essence of petitioner's argument is that the 1912 Act, as amended, was originally intended to be used to acquire toll bridges and that therefore it could not be enlarged to include the instant case. The obvious answer is that the legislatures of both States specifically provided that this act should be used in acquiring New Jersey property and as they prescribed no other method this is the exclusive manner in which the Bridge Commission is to award "damages" for property "injured".

It is submitted that there is no alternative method defined and that the Act of 1912 as amended is the exclusive method which the Bridge Commission is to pursue.

Conclusion

The writ of certiorari should be dismissed for lack of jurisdiction or if this Court decides it has jurisdiction the decision of the New Jersey Court of Errors and Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 563.—OCTOBER TERM, 1939.

Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, Petitioner,
 vs.
 John D. Colburn and Bessie Colburn. } On Writ of Certiorari to
 the Court of Errors and
 Appeals of the State of
 New Jersey.

[May 27, 1940.]

Mr. Justice STONE delivered the opinion of the Court.

The question is of the right of respondents to recover consequential damages to their New Jersey land, due to interference with their access to the land and with their light, air and view caused by petitioner's construction of a bridge abutment on adjacent land. The answer turns on the question whether the Compact of 1934 between New Jersey and Pennsylvania authorizing the construction of the bridge and its approaches, excluded the application to petitioner of a New Jersey statute without which respondents would enjoy no right of recovery under New Jersey law.

Petitioner, the Bridge Commission, is a "body corporate and politic" created by the Compact adopted by the legislatures of the two states, N. J. P. L. 1934, Ch. 215 (now N. J. R. S. 1937, 32:8-1 *et seq.*), 1931 Pa. P. L. 1352; 1933 Pa. P. L. 827, and consented to by Congress, 49 Stat. 1058 (1935). The Compact authorized the Commission to build bridges across the Delaware River between the two states, and for that purpose gave the Commission authority to acquire real property by purchase or by the exercise of eminent domain. The Commission, in the exercise of its authority in construction of a bridge between Phillipsburg, New Jersey and Easton, Pennsylvania, acquired by purchase land in the town of Phillipsburg, upon which it has located and constructed a highway approach to the bridge, on an embankment or abutment leading to the New Jersey end of the bridge. The property thus acquired and used includes land adjoining the rear of property owned

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by respondents, having its front on a public street. The embankment and the land on which it rests also crosses certain streets in the neighborhood not immediately adjacent to respondents' land which have been permanently closed by the public authorities, in order to provide for the bridge approach.

The present suit is a proceeding in mandamus, brought in the New Jersey Supreme Court to compel the Commission to take proceedings, which it is alleged are authorized and required by the Compact, to fix and award compensation to respondents for damages to their land, suffered by reason of the Commission's action in the construction of the abutment. The State Supreme Court sustained the special verdict of a jury which found that the Commission's action had damaged respondents by depriving them of access to their land and their enjoyment of light, air and view. The court found as a matter of law that as the abutment was located wholly on land acquired by the Commission, and as the streets in the neighborhood had been closed and grades changed by state authority, respondents were without right of recovery for the damages suffered, in the absence of some statute authorizing recovery. But it found such a statute in Ch. 297 of P. L. 1912 as amended by Ch. 76 of P. L. 1919 (now N. J. R. S. 1937, 32:9-1 *et seq.*), which it construed with the Compact as requiring the Commission to compensate for the damages which respondents had suffered. 119 N. J. L. 600.

Respondents, being without other adequate legal remedy, the court awarded a peremptory mandamus directing petitioner to compensate them for the damage or to take proceedings for the determination of the amount to be awarded as compensation pursuant to the provisions of Article III of the Compact, which it also held required the proceedings for that purpose to be taken according to Chapter 297 of P. L. 1912 as amended by Ch. 76 of P. L. 1919 (now N. J. R. S. 1937, 32:9-1 *et seq.*). On appeal the New Jersey Court of Errors and Appeals affirmed on the same grounds as those on which the Supreme Court rested its decision. 123 N. J. L. 197. We granted certiorari January 15, 1940, the questions of the construction of the Compact between states and of the jurisdiction of this Court being of public importance.

In *People v. Central Railroad*, 12 Wall. 455, jurisdiction of this Court to review a judgment of a state court construing a compact

between states was denied on the ground that the Compact was not a statute of the United States and that the construction of the Act of Congress giving consent was in no way drawn in question, nor was any right set up under it. This case has long been doubted, see *Hinderlader v. La Plata Co.*, 304 U. S. 92, 110, note 12; and we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal "title, right, privilege or immunity" which when "specially set up and claimed" in a state court may be reviewed here on certiorari under § 237(b) of the Judicial Code, 28 U. S. C. § 344. See *Green v. Biddle*, 8 Wheat. 1; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518; *Wedding v. Meyler*, 192 U. S. 573; cf. *Wharton v. Wise*, 153 U. S. 155; *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 161; *Hinderlader v. La Plata Co.*, *supra*. Hence we address ourselves to the language of the Compact on which respondents rely to sustain a right of recovery for injury to their lands, for which, apart from the New Jersey statute of 1912, referred to in the Compact, the New Jersey courts have held there is no support in state law.

The Compact created the Commission as a "public corporate instrumentality" of the two states, to perform state functions, among others, the location, construction, operation and maintenance of bridges extending between the two states and across a specified section of the Delaware River. To this end it conferred upon the Commission the power:

- "(b) To sue and be sued;
- (c) To enter into contracts;
- (d) To acquire, own, use, lease, operate and dispose of real property and interests in real property, and to make improvements thereon; and
- (e) To exercise the power of eminent domain."

In connection with the acquisition of any real property for any authorized purpose, Article III of the Compact provides:

"If the commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property, in the State of New Jersey, for any reason whatsoever, then the commission may acquire such property by the exercise of the right of eminent domain, in the manner provided by the act of the State of New Jersey, entitled 'An Act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of

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Pennsylvania, of toll bridges across the Delaware River; and providing for free travel across the same,' approved the first day of April, one thousand nine hundred and twelve (Chapter, two hundred ninety-seven), and the various acts amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River."

It further provides:

"The term 'real property,' as used in this compact, includes lands, . . . and interests in land, . . . and any and all things and rights usually included within the said term, and includes not only fees simple and absolute but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses, and all other incorporeal hereditaments, and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate."

It will be noted that the effect of these provisions is to authorize the Commission to acquire "real property" by purchase or by eminent domain, and that by definition real property includes "interests in land" which are so defined as to include "claims for damage to real estate", and that where resort to eminent domain is needful for the acquisition of such interests, the exercise of that power is to be "in the manner provided" in the New Jersey statute of 1912 as amended. By its terms the Compact confers upon the Commission the power to acquire the specified interests in land or relating to land, conditioned upon payment for the interests acquired, at amount agreed upon or fixed by proceedings in eminent domain. Beyond this it imposes no duty or obligation on the Commission to compensate for damages inflicted by its acts, but leaves the Commission subject to such liability as is imposed by the law of the state within which the Commission acts.

The New Jersey statute of 1912 which, as prescribed by Article III of the Compact affords the procedure by which the Commission is to exercise its power of eminent domain, does not enlarge the duties or liability of the Commission as prescribed by the Compact. The amended statute of 1912 authorized a state commission, acting in cooperation with a like commission of Pennsylvania, to acquire the rights, franchises and property of bridge companies owning and operating existing toll bridges across the Delaware River within specified territory and to operate and maintain them as free bridges.

It authorized the Commission to acquire the bridges by purchase or by eminent domain and for that purpose "to determine the compensation to be allowed as of the time of entry upon the property and taking possession thereof for the value of property, franchises, easements or rights in the two states." It commands that after view of the premises and hearing the Commission, in determining the amount of compensation, "shall estimate the value of the property taken, including any easement, rights or franchises incident thereto, as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable."

Respondents insist that this direction that the commission created under the 1912 Act "shall estimate . . . damages to property taken, injured or destroyed" is, by the Compact, made a direction to petitioner for payment of consequential injuries to property to which the Compact makes no reference. Under the generally applicable decisions and statutes of New Jersey, as her courts have held in this case, the Commission is without liability to pay consequential damages. But it found a statutory creation of such liability in the Act of 1912 as amended in 1919. At the time of the adoption of the Compact there was no statute in New Jersey purporting to impose such a liability which was on its face applicable to the Commission. If the Act of 1912 as amended imposed such a liability, it appeared to be applicable only to a different corporate body from petitioner and then only in the case of the transfer of ownership of existing toll bridges to the commission the acquisition of which could inflict no consequential damages. In entering into a compact it was then competent for the states to provide by its terms the extent to which they were to take over and apply to the new Commission, performing a different function under different circumstances, the substantive rules governing compensation upon the acquisition of existing toll bridges under the 1912 Act. The Compact was explicit in its specifications of what property interests should be taken and compensated for, and of the right and authority of the Commission to acquire them by purchase or by eminent domain. By its silence it left the Commission subject to such liability for consequential damages only as was imposed by the laws of the state, including the Act of 1912, except in so far as the Compact restricted the application of that Act. The Compact was equally explicit in its statement of the effect which was to be given to the 1912 Act and its amendments.

It is plain that, under the Compact, without reference to that legislation, the Commission could have acquired land by purchase and built a bridge upon it without subjecting itself to liability for consequential damages. But it was necessary that a procedure should be adopted for the exercise of the power of eminent domain conferred on the Commission by the Compact and this was done by the provision of the Compact that "the Commission may acquire such property by the exercise of the right of eminent domain, in the manner provided" by the 1912 Act. Under the Compact that Act is given effect only to the extent that it affords a manner or procedure of exercising the right of eminent domain, which is called into operation only if the Commission is unable to acquire needed property by purchase and then only as a means of fixing the compensation which, under the Compact, the Commission is required to pay. The Compact can be given a more extensive effect only by disregarding its language and by attributing to its draftsmen an intention to adopt a rule of damages not generally applicable in the state and now for the first time adopted by a construction plainly inapplicable to the acquisition of existing toll bridges to which the Act of 1912 and its amendments alone referred.

Only by reading into the words of the Compact such a strained and unnatural meaning, is it possible to find in it a modification of the settled law of the state defining the recoverable damages upon the construction of public works. Nothing in the history of the Compact has been brought to our attention to suggest any reason or purpose for such modification in the special case of bridges to be constructed between the two states. Both the New Jersey courts thought they discerned such a reason in Article XVI, § 8 of the Pennsylvania constitution of 1872, which provides: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements . . ." In passing upon this case they thought that this provision of the Pennsylvania constitution as construed by two decisions of the Pennsylvania Supreme Court in 1888 and 1889, *Chester County v. Brower*, 117 Pa., 647; *Appeal of Delaware County*, 119 Pa. 159, required compensation for consequential damages in eminent domain proceedings.

From this they reasoned that by the provisions of the Compact for the acquisition of property by eminent domain proceedings "in the manner" provided by the 1912 Act with its stipulation for payment of "damages for property taken, injured or destroyed" it was intended by the Compact to make the rule of damage under the Pennsylvania constitution applicable to property similarly acquired by the Commission in New Jersey. But this reasoning overlooks the important circumstance that the Pennsylvania courts have consistently ruled that the constitutional provision is without application where there is no taking by eminent domain, and that municipal corporations or others, although possessed of the power of eminent domain, are not liable for consequential damages inflicted by the erection of structures wholly on their own land acquired by purchase. *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541; *Hartman v. Pittsburgh Incline Plane Co.*, 159 Pa. 442; *Gillespie v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 226 Pa. 31; *Ridgeway v. Philadelphia & Reading Ry. Co.* 244 Pa. 282.

Moreover, in 1928, six years before the Compact, the Supreme Court of Pennsylvania, in *Westmoreland Chemical & Color Co. v. Public Service Commission*, 294 Pa. 451, departed from its ruling in *Chester County v. Brower, supra* and *Appeal of Delaware County, supra*, and has since held that the constitutional provision in the absence of a statute requiring it gives no right of recovery from a landowner for consequential damages resulting from structures located wholly on his own land whether acquired by purchase or eminent domain. *Hoffer v. Reading Co.*, 287 Pa. 120; *Soldiers and Sailors Memorial Bridge*, 308 Pa. 487, 491; *McGarrity v. Commonwealth*, 311 Pa. 436, 439.

Even though it be thought that it was intended to adopt, by the 1912 Act, the then prevailing interpretation of the Pennsylvania constitutional provision, that fact could have no force here, both because the constitutional provision has never been regarded by the Pennsylvania courts as applicable to the use of land acquired by purchase and because the Compact by its terms excludes the 1912 Act from its operation except in so far as it affords a manner or method of procedure when the Commission resorts to eminent domain.

Reversed.